The Judicial System in Utah: Organic Act to the Twentieth Century

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Introduction

The judicial history of Utah has been one of constant change and consolidation of power. Having extended through three distinct periods of government, the state now has a solidified judiciary composed of seven state and three federal courts. Throughout its history, the system has been the scene of duplicated jurisdiction leading to conflict on a number of grounds. First, the separation of secular and ecclesiastical systems was not a part of early Utah. Thus leading to conflicts between Mormons and non-Mormons. Later, the dual role played by church officials and the court led to conflicts between the territorial federal courts. This eventually was solved by supreme court decisions as to jurisdiction, federal legislation and finally with the granting of statehood, the systems shortcomings were ironed out.

To fully understand the implications of this long, complex history it is necessary to begin with the period when what is now known as the State of Utah was called the State of Deseret. This period comprises the years 1847 to 1850. Second, the territorial period from 1850 to 1896. And finally, the period following

granting of statehood, 1896 to the present.

It must be noted at the outset however, that the periods are not distinct unto themselves. The provisional government was established and in existence following the passage of the Organic Act of 1850 due to the slow communication between "the States" and Great Salt Lake City. Similarly, there is a period of limbo between the territorial period and when Utah was admitted to the Union as the forty-fifth state due to the passage of the Enabling Act of 1894.

The Courts in Deseret

Dale Morgan, in his study "The State of Deseret," examines the judicial system in Utah during the Deseret period by taking into account the "specific trust of the Mormons in their leaders, and the sense of responsibility held by the leaders toward their people -- a conception of inter-responsibility and mutual faith which was certainly a more vital ethical relationship than is ordinarily observed between governors and governed."[1]

In 1847, judicial authority was wielded by the High Council.[2] Morgan refers to the role of the High Council as "analogous to informal courts which functioned in early England as an adjunct to

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[1]Dale Morgan, "The State of Deseret," *Utah Historical Quarterly* VIII (April, July, October, 1940): 64-251. Hereafter Morgan, "The State of Deseret."

[2]The High Council dates from a revelation issued by Joseph Smith in Kirtland, Ohio on February 17,1834. The council is composed of twelve high priests and is presided over by one or three presidents, according to the circumstances.

the common law." The council acted as the ruling judiciary until November 7, 1847 when five bishops were appointed in wards throughout the city. "Under the government of the Bishops, Utah grew up, and, until the regular incorporation of Great Salt Lake City in 1851, they held what is usually considered the secular administration over the people; Brigham Young was their director, for he formulated and constructed everything in those early days."[3] These men then sat as courts of arbitration when local disputes arose. Unfortunately, the records of these courts are not available for examination from the LDS Church Historian's Office.

The rationale behind the bishop's court was to "obviate the often expensive and futile recourse to civil law. It is necessary to realize that prior to the passage of the Organic Act on September 9, 1850, there was no secular judicial system in the unorganized territory. Decisions of the bishop's court were often accepted without question, but could be appealed to the High Council of the stake and then to the general authorities of the church.[4]

One of the greatest services provided by the courts was the mediation of disputes arising between members of emigrant companies that parted on the trail without agreeing on the division of communal property. Captain Howard Stansbury, while surveying the Salt Lake Valley in 1849 commented on the decisions of the

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[3]William W. Tullidge, *The History of Salt Lake City and Its Founders* (Salt Lake City: Edward W. Tullidge, Publisher and Proprietor, 1886): 56-57.

The bishop in the Church of Jesus Christ of Latter-day Saints is somewhat synonymous with the parish priest in the Catholic Church. Each presiding over the ecclesiastical concerns of a defined area.

[4]Morgan, "State of Deseret": 72.

Mormon courts as: "remarkable for their fairness and impartiality, and if not submitted to, were sternly enforced by the whole power of the community."[5]

The decisions handed down varied from disfellowship from the church to division of contested property to the infliction of fines and punishment. The decisions of the courts and Council were enforced by the marshal and his delegated assistants. Fines in both civil and criminal cases were collected either through payment or the confiscation and sale of personal property. Later, a person was allowed to "work until they [had] paid the fines ... due from them."[6] In cases where punishment rather than a fine was meted out, and owing to the lack of a jail, whipping was invoked. On October 25, 1847, John Nebeker, the public complainer,[7] was required to prosecute a man for stealing a lariat, then administer the court's decision which was a fine of ten dollars or ten lashes. Nebeker, feeling sympathetic towards the defendant, offered to pay the fine but was rebuked. The man, being of a legalistic mind as Nebeker recalled:

> ... refused to be tied [to the Bell Post or Liberty Post]; said it was not in the decision. C. C. Rich was appointed by the Council to see that the whipping was

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[5]Eugene E. Campbell, "Governmental Beginnings," in Richard D. Poll, et al., eds, *Utah's History* (Provo, Utah: Brigham Young University Press, 1978), 153-173.

[6]Ibid.: 74.

[7]The position of Public Complainer appears to be similar to that of prosecutor in criminal cases. See John Nebeker, "Early Justice in Utah," *Utah Historical Quarterly* III (July, 1930): 87-89.

> carried out in the spirit and meaning of the judgement. I appealed to him whether he should be tied or not. Rich decided that as the decision did not mention it and the the man didn't want to be tied, it was his right to choose for himself, inasmuch as he would stand to be whipped. He said he would stand up to it. He was then told to strip. He refused on the ground that it was not in the decision.But his refusal would not count. He stripped and the lashes were administered in the presence of the people.[8]

In the absence of an organized judiciary, the High Council took it upon themselves to pass a number of laws regulating civil and criminal activities in December of 1847. The first ordinance concerned vagrancy in that any person found not working to "his utmost exertion to cultivate the earth in order to sustain himself or his family" was to have two or more trustees appointed to take charge of his property to hold in security for the support of himself and his family. The order further declared that it was the responsibility of the trustees to see that the convicted person was "industriously employed, the proceeds of which employment shall be held and applied in the same manner and for the same purpose as the property before mentioned."[9]

The second, third, fourth and fifth ordinances passed in December involved a variety of criminal offenses. Among these, disorderly conduct and disturbing the peace was punishable by receiving a number of lashes, not to exceed thirty nine, on the bare back or a fine in any sum not less than five dollars, nor exceeding

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[8]Nebeker, "Early Justice in Utah": 88, and Hubert Howe Bancroft, *History of Utah* (San Francisco: 1889): 272.

[9]Morgan, "State of Deseret," Appendix B.

five hundred. For the crimes of adultery or fornication the convicted person could receive a like number of lashes and a fine, not to exceed one thousand dollars. Housebreaking, theft or "maliciously causing the destruction by fire of property," could land the convict lashes, not to exceed thirty nine, and they could be required to restore of the property at four fold its original value.[10] The final two ordinances were directed at conserving the amount of timber available for firewood and building fences, and requiring persons to keep their animals confined.[11]

On March 15, 1849, a committee was appointed to draft a constitution to establish a provisional government for the State of Deseret. On March 18th, Albert Carrington, chairman of the drafting committee reported their efforts to the constitutional convention at which point it was unanimously accepted.[12]

Section IV of the *Constitution of the State of Deseret* outlines the judicial system. The power of the judiciary was vested in a supreme court which exercised such jurisdictions and appellate powers "as shall be prescribed by law." The court was composed of a chief justice and two associate justices, and "such inferior courts as the General Assembly shall from time to time establish." The justices were elected for a term of four years by joint vote of both

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[10]The biblical background for the practice of four fold restitution can be found in: Exodus 22:1; 2 Samuel 12:16 and St. Luke 19:8.

[11]Morgan, "State of Deseret," Appendix B.

[12]*Laws and Ordinances of the State of Deseret (Utah): Compilation 1851, Being a Verbatim Reprint of the Rare Original Edition, with an Appendix* (Salt Lake City: Shepard Book Company, 1919): 77. Hereafter *Laws of Deseret* with page number(s).

houses of the General Assembly.[13]

Although the constitution was accepted in March of 1849, it was not until January 9, 1850 that any action was officially undertaken to provide for the judicial system. With "An Act to Provide for the Organization fo the Judiciary of the State of Deseret," the provisional assembly defined the power vested in the supreme court and created the county court and the office of justice of the peace.[14]

The provisional supreme court held appellate jurisdiction "in all cases of Law and Equity which may be tried by the Inferior Courts." They were also to hold original jurisdiction for all civil cases where the amount in dispute was greater than one thousand dollars.[15]

The county court was similarly established to be presided over by a chief justice and two associate justices "whenever the necessity of the inhabitants of said County required it." The position of chief justice was filled by election by joint vote of the General Assembly, and the associate justices were to be elected by the people of the county. Each judge was elected for a term of four years. The jurisdiction of the county court was over all matters, both civil and criminal, on cases involving amounts exceeding one hundred dollars and on appeals from the justices' courts. Additionally the county court was empowered to grant writs of

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[13]*Laws of Deseret:* 85.

[14]Morgan, "State of Deseret,": 169-174.

[15]Ibid.: 169.

habeas corpus and to "administer justice in all cases regardless of technical forms of law."[16]

With "An Act to Incorporate Great Salt Lake City," approved January 9, 1851, several courts were established. The act empowers the mayor and aldermen of the city as "conservators of the peace. The were to hold equal power with the justices of the peace and were commissioned as such.[17]

The mayor and aldermen were allowed to act individually as justices of the peace, exercising original jurisdiction over all matters arising under city ordinances. Appeal from either was allowed to the municipal court.

The municipal court was established under the same act. It was to be composed of the mayor, acting as chief justice, and the aldermen, as associate justices. Appeal from this court could be taken to the county court of Great Salt Lake County, similarly to judgements appealed from the justices' courts.

Seven days later the assembly of the State of Deseret enacted an ordinance providing for the establishment of a probate court separate from the county court. Its power was clearly outlined as taking the "probate of wills," and the "administration of the estates of deceased persons..."[18]

The judge of the probate court was to be elected by the joint vote of the House and Senate and would serve for the same length of

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[16]Ibid.: 171-72.

[17]*Laws of Deseret:* 14-15.

[18]*Laws of Deseret:* 22-24.

time as the judge of the county court. However, a second clause in the ordinance states that "the chief justice of each county may be appointed probate judge, for their respective county." Thus allowing a single person to "wear two robes" as it were.

Appeal from the probate court was to be directly to the supreme court which was to have "appellate jurisdiction of all matters determinable by the respective judges of probate." The only limitation on appeal was that it had to be made within twenty days from the date of the proceedings appealed from.

Territorial Judiciary

With a petition for statehood, which was granted in limited fashion as part of the Missouri Compromise by establishing Utah Territory, the following men were suggested to President Fillmore by Dr. John M. Bernhisel for appointment to territorial office:[19]

Governor	Brigham Young
Secretary	Willard Richards
Chief Justice	Zerubbabel Snow
Associate Justice	Heber C. Kimball
Associate Justice	Newel K. Whitney
Marshal	Joseph L. Heywood
U.S. Attorney	Seth M. Blair

Under the terms of the Organic Act of 1850 the judicial power of the Territory was to be vested in a supreme court, district courts, probate courts and with justices of the peace. The supreme court was to consist of a chief justice and two associate justices appointed by the federal government for a period of two years. The territory was divided into three judicial districts as defined by the territorial governor until the legislative assembly met for the first time at which point the assembly could alter or modify the districts. Each was to contain a district court to meet twice a year, being presided over by a justice of the supreme court.[20] The probate

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[19]Russell R. Rich, *Ensign to the Nations: A History of the Church From 1846 to 1972* (Provo, UT: Brigham Young University Publications, 1972): 190.

[20]*The Compiled Laws of the Territory of Utah, Containing all the General Statutes Now in Force* (Salt Lake City: Deseret News Steam Printing Establishment, 1876), 31-

courts were to be established on the county level with the judges elected by the legislative assembly each year.

Upon signing the Organic Act for the Territory of Utah, President Millard Fillmore appointed the following officials:

Governor	Brigham Young	Mormon
Territorial Secretary	B. D. Harris	Non-Mormon
Chief Justice	Lemuel Brandebury	Non-Mormon
Associate Justice	Perry E. Brocchus	Non-Mormon
Associate Justice	Zerabbabel Snow[21]	Mormon
U. S. Marshal	Joseph L. Heywood	Mormon
U. S. Attorney	Seth M. Blair	Mormon

The affirmation of a mixed slate of officials was a disappointment to the Mormons who had hoped to have all governmental positions filled by members of the church. However, taking business at hand, Brigham Young then designated each supreme court justice to preside over the following courts on August 8, 1851: first district, the Honorable Lemuel G. Brandebury; second district, the Honorable Zerabbabel Snow; and third district, the Honorable Perry E. Brocchus.[22]

In a proclamation issued by Brigham Young on August 8, 1851 the judicial districts were defined as:

32, 34. Hereafter *Laws of Utah* with the appropriate year and page(s). This form of citations will be consistent from the territorial period through statehood.

[21]In the appendix of his history of Salt Lake City, Edward W. Tullidge has a short but interesting autobiography of Snow. It covers his life before joining the L.D.S. Church, during his judicial administration, and subsequent period of public life. He (Snow) offers some interesting insights into the "run-away" judges controversy also. See: Edward D. Tullidge, *History of Salt Lake and Its Founders* (Salt Lake City: Edward W. Tullidge, Publisher and Proprietor, 1886).

[22]Eugene E. Campbell, "Governmental Beginnings," in Richard D. Poll, et al., eds, *Utah's History* (Provo, Utah: Brigham Young University Press, 1978), 160.

> ...the city and county of Great Salt Lake, the county of Tooele, and the adjacent territory east and west to the boundaries of the territory including Bridger's precinct, shall comprise the first judicial district.
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> ...the counties of Davis and Weber, and the adjacent territory east, west and north, tot he boundaries of the territory, shall comprise the second judicial district.
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> ...the counties of Utah, San Pete, and Iron and the adjacent territory east, west and south to the boundaries of the territory shall comprise the third judicial district.[23]

On October 4, 1851 the Territorial Assembly confirmed Governor Young's proclamation and enacted legislation which had previously been adopted for the State of Deseret which further defined the districts as:

> That the said Judicial District for said Territory shall consist of, and embrace the following Counties and Districts of country, to wit: --Great Salt Lake, Davis, Weber, Tooele, and Utah counties, and all districts of country lying east, north and west of said Counties in said Territory. The second Judicial District shall consist of Millard and San-Pete Counties, and all Districts of country, lying south of the south line of latitude of Utah County, and north of the south line of latitude of Millard County, within said Territory. And the third Judicial District shall consist of Iron County, and all districts of country lying south of the south line of latitude of Millard County in said Territory.[24]

In "An ACT in Relation to the Judiciary," approved February 4, 1852, the power of the district court was established as exercising "original jurisdiction, both in civil and criminal cases, and as well

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[23]"Executive Proceedings 1850 to 1854 and Elections and Commissions, Book A," Utah State Archives Series #0242, Box 1, 14-15. "Hereafter Executive Proceedings, Book A" with page number.

[24]*Laws of Utah,* 1850-53, 12.

in 'Chancery as at Common Law,' when not otherwise provided by law." Officers of the court were established as: a clerk to keep the official records of the court, a recorder if the judge should so desire, in addition to a statement requiring the sheriff of the county in which the court was sitting to attend the sessions of the court with all necessary assistants. The act further defined the rules of the court as being based upon accepted standards of jurisprudence.[25]

The Act defined the powers to be vested in the probate court as being the same as those held by the district court. It too, was granted original jurisdiction in all cases when not prohibited by law. Also, "jurisdiction of the Probate of wills, the administration of the estates of deceased persons, and the guardianship of minors, idiots and insane persons."[26]

The rationale behind granting original jurisdiction in both the district and probate courts lies in a pragmatic response to the problems of the territorial judicial system. Non-Mormon complaints about the jurisdiction of the probate courts often centered on accusations of Mormon Church attempts to undermine the authority of the federal judges. Many Mormons, on the other hand, argued that it was impossible to obtain impartiality at the hands of the federal justices prior to 1852. These complaints center around an issue involving the so-called "run-away" judges.

Following the establishment of the territorial government in

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[25]*Acts of the Legislature of Utah, 1850-1853*, Utah State Archives Series #3148, 13-18.

[26]*Acts of the Legislature of Utah, 1850-1853*, Utah State Archives Series #3148, 15-16.

Utah, and prior to the arrival of the appointed federal officials,[27] Brigham Young took it upon himself to take a census of the territory and call for the election of legislators. This action offended the incoming officials as the secretary of the territory, Broughton D. Harris, was to supervise both census taking and elections under the terms of the Organic Act. As a result of Young's perceived illegal procedures, Harris refused to turn over $24,000 appropriated by Congress for the maintenance of the territorial government.[28]

A further rift was torn between the Mormons and the federal officials when at the July 24th celebration in 1851, at which the federal officials were invited guests, Daniel H. Wells presented an oration blasting the federal government for allowing "mobocracy and barbarity" within its borders.[29] Brigham Young followed with a discourse in which he exclaimed "Zachary Taylor is dead and gone to hell, and I am glad of it!"[30] Regardless of what one historian has claimed about the "foreigners" not being "accustomed to the blunt

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[27]The federal officials arrived on the following days: Chief Justice Lemuel G. Brandebury, June 7, 1851; Associate Justice Zerubbabel Snow, Indian Agents Stephen B. Rose and Henry R. Day, along with Dr. John M. Bernhisel and Almon W. Babbitt, July 19, 1851; and finally Perry E. Brocchus and Albert Carrington, August 17, 1851. Russell R. Rich, *Ensign to the Nations: A History of the Church From 1846 to 1972* (Provo, UT: Brigham Young University Publications, 1972): 192.

[28]Eugene E. Campbell, "Governmental Beginnings," in Richard D. Poll, et al., eds, *Utah's History* (Provo, Utah: Brigham Young University Press, 1978), 161-63.

[29]Gene A. Sessions, *Mormon Thunder: A Documentary History of Jedediah Morgan Grant* (Urbana, Ill: University of Illinois Press, 1982): 87.

[30]Perry E. Brocchus to Millard Fillmore, September 20, 1851; in William Mulder and A. Russell Mortensen, eds., *Among the Mormons: Historic Accounts by Contemporary Observers* (Lincoln, NE: University of Nebraska Press, 1973): 251. See also: Russell R. Rich, *Ensign to the Nations: A History of the Church From 1846 to 1972* (Provo, UT: Brigham Young University Publications, 1972): 195. Rich notes that the statement "I know Zachary Taylor. He is dead and damned and I cannot help it" is found in the "Manuscript History of Brigham Young", September 8, 1851: 61-64.

style of Mormon oratory," the comments were taken at face value, resulting in offense to the newly appointed officials.[31]

At a special conference held during the second week of September in 1851, Justice Perry E. Brocchus requested permission to address the congregation. The judge's comments began with complimenting the Mormons on the development of a judiciary prior to the establishment of territorial courts, then approached the matter of Utah sending a block of granite to be used in the construction of the Washington monument in the nation's capitol.

Brocchus' remarks then turned to those of Wells and Young a month earlier, taking a defensive stand on the Polk administration's actions in calling the Mormon Battalion and not offering aid to defend the Mormons in Missouri and Illinois. Brocchus then turned his statements toward the ladies of Utah and "strongly recommended that they become virtuous," an obvious reference to the practice of polygamy.[32]

The combination of the illegal actions on the part of the governor, and the growing conflict between the federal appointees and Mormon populous, spurred the federal officials to abandon their positions and take leave of the territory. The fact that the judges, secretary of the territory and Indian agent were planning to leave

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[31]Gene A. Sessions, *Mormon Thunder: A Documentary History of Jedediah Morgan Grant* (Urbana, Ill: University of Illinois Press, 1982): 87.

[32]Perry E. Brocchus to Millard Fillmore, September 20, 1851; in William Mulder and A. Russell Mortensen, eds., *Among the Mormons: Historic Accounts by Contemporary Observers* (Lincoln, NE: University of Nebraska Press, 1973): 251-52; and Gene A. Sessions, *Mormon Thunder: A Documentary History of Jedediah Morgan Grant* (Urbana, Ill: University of Illinois Press, 1982): 88.

the territory was of little concern to Governor Young. What did trouble him was that Harris continued to refuse to turn over the funds.

On September 17, 1851, Young summoned the Legislative Assembly with the intent of remedying the situation. In his first annual message to the assembly, Young discussed the provisions of the Organic Act allowing the governor to fill vacancies made by "deaths, removal, or other necessary absence" of officials appointed by the "general government." In Young's words:

> This subject becomes of greater moment, from the fact of several of the officers so appointed by the General Government, proposing to leave the Territory early in October next [1851], nor would it involve this Government in so much difficulty, were its proximity to the General Government less, or its means of communication thereto more, extensive. But being liable to be deprived of any, and especially so many of those important officers for such a length of time, as necessarily transpire in the event of their going, and Congress not having provided any remedy, it appears to become not only a 'rightful,' but a necessary subject of legislation; to provide by law for the present emergencies.[33]

In an attempt to prevent the removal of funds from the territory and drawing upon the terms of the Organic Act which provides "that the Governor shall see the laws faithfully executed," Young requested an opinion from the Territorial Supreme Court on September 26, 1851.[34] The opinion was received the next day.

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[33]First Annual Message of His Excellency, Governor Brigham Young, to the Legislative Assembly of Utah Territory, September 22, 1851,"Executive Proceedings, Book A," 20.

[34]Brigham Young to The Honorable Judge Brandebury, September 26, 1851.

The response spelled out first, that the Court had foreshadowed an opinion by granting an injunction preventing Horace Eldredge "and all others acting by, or under, the authority of the assembly, purporting to be the Legislative Assembly of the Territory, from taking or interfering with the funds and property in his (B. D. Harris') possession." Second, that the request for an official judicial opinion could not be granted as the justices were not legal advisers to the Governor and that the matter was not judicially before the court. The justices did however agree to present opinions to assist Governor Young in the discharge of his duties.

The non-binding opinion concludes that "neither the Executive, Legislative, nor Judicial branch of the Territorial Government have any right, or power to interfere with the Secretary, to control his disposition of the funds and property referred to, because he is the agent of the United States Government." It elaborates on the powers of the Secretary as being discretionary in nature with no power available to compel him to follow any territorial mandate. The only remedy for a violation of his position would be removal and the substitution of another officer. In the case of Harris, the only person capable of removing him was the President of the United States.[35]

On September 28, 1851, Judges Brocchus and Brandebury, along

"Executive Proceedings, Book A," 25.

[35]Lemuel G. Brandebury, Z. Snow and P. E. Brocchus to Brigham Young, September 27, 1851. "Executive Proceedings, Book A," 25.

with Secretary of the Territory Harris, left Salt Lake City for their return to Washington D.C. Their arrival set off a chain of events that would influence the treatment of Utah well into the 1890s.

The flurry of letters transmitted between the parties, President Millard Fillmore and Congress are quite enlightening. The correspondence from Brigham Young reveals a governor trying to defend his actions basing his defense upon the lack of government appointees until nearly eight months after the territory was created.[36]

The communications of the judges read more like an indictment against the Mormon officials and community. Making charges of "the Mormon Church overshadowing and controlling the opinions, the actions, the property, and even the lives of its members; usurping and exercising the functions of legislation and the judicial business of the Territory; organizing and commanding the military; disposing of the public lands, upon its own terms; coining money stamped 'Holiness to the Lord'; and openly sanctioning and defending the practice of polygamy, or plurality of wives."[37]

Of all the accusations, the revelation of the Mormons' practice of polygamy had the most damaging effect. This situation forced the Mormon Church presidency to publicly acknowledge its existence. Opposition on the part of the federal government then led to the passage of the 1862 Antibigamy Act, the Poland Act in 1874, the

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[36]"Executive Proceedings 1850 to 1854 and Elections and Commissions, Book A," Utah State Archives Series #0242, Box 1.

[37]Brandebury, Brocchus and Harris to Millard Fillmore, December 19, 1851. *Congressional Globe,* 32nd. Congress, 1st. Session, Appendix XXV: 86-90.

Edmunds Act and the Edmunds-Tucker Act of 1882.

In the debate over who was responsible for the conflict, both sides claim not to be at fault. This however is inaccurate. The Utah delegate to Congress, Dr. John M. Bernhisel, while attempting to exonerate Brigham Young, claimed to have been at the conferences where the alleged remarks were made. Zerubbabel Snow, the only Mormon appointed to the district court bench and in an attempt to remain judicially impartial to the subject, provides some insight onto the situation in his letter to Fillmore:

> I forebear to state the facts for the reason that Judges Brandebury and Brocchus, and Secretary Harris will see you in person, and also Doctor Bernhisel, delegate from Utah, who will be able to inform you much better than I can by letter.
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> It is proper to state that Doctor Bernhisel left here before the main facts occurred which led to this event; he, therefore, will have to be informed of them by the people here.[38]

Without justices to hold court, it was necessary to turn to the probate courts for action. Additionally, the probate courts allowed for the trying of persons before men of the community rather than judges from the East who were not familiar with local problems nor Mormon philosophy. A final point in favor of the extended powers of the probate court concerns the vast geographic area covered by each district. This required, in many cases, traveling well over one

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[38]Zerubbabel Snow to Millard Fillmore, September 22, 1851. *Congressional Globe,* 32nd. Congress, 1st. Session, Appendix XXV: 86.

For a thorough discussion of the conflicts impact on the economy, judiciary and on Brigham Young himself, see: Leonard Arrington, *Brigham Young: American Moses* (New York: Alfred A. Knopf, 1985): 223-49.

hundred miles to the district court.

James B. Allen notes that the problem of "run-away" judges was not confined to Brocchus and Brandebury. In 1863, after only one term of court, during which no cases were docketed, Justice Charles B. Waite left the territory. The diary of George W. Bean, Probate Judge of Utah County, also mentions the fleet footed jurists:

> It will be remembered that District Judge Cradelbaugh dismissed the Court and, as we say "Flew the Coop" as he never returned, and hence the Probate Court had to take over criminal cases. ...In due time the question of jurisdiction came up, and crime became more frequent and desperate since the army days, with some few men. Of course, men accused of cattle stealing, selling liquor to the Indians, hiring them to steal cattle, etc. were tried in our Court until District Judges could be brought for the various districts according to population and politics. We had Grand Juries and parties were tried and indicted and punished the same as in U. S. District Courts.[39]

Although the action on behalf of the territorial assembly in granting original jurisdiction to both courts was hardly conventional, it was seen as being quite within the authority of the original Organic Act. Although unusual, it was not unique. The territories of Nebraska, Colorado, Montana and Idaho awarded their probate courts limited extra powers. Nevertheless, the Utah courts with their unqualified criminal and civil authority were the most extreme examples of such jurisdictional assignments. Further, since the law officer of the Secretary of State had to approve all

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[39]Cited as Flora Diana Bean Horne, comp.,*Autobiography of George Washington Bean, A Utah Pioneer of 1847, and His Family Records* (Salt Lake City, 1945): 148-49 in Allen, "Jurisdiction," 135.

legislation passed by the territorial legislatures, the action of the Utah Assembly received an official blessing.[40]

During the first legislative session, on February 7, 1852, the following men were elected to serve as Probate judges for the several counties of the territory:[41]

Davis County	Joseph Holbrook
Great Salt Lake County	Elias Smith
Iron County	Chapman Duncan
Juab County	George Bradley
Millard County	Anson Call
San Pete County	George Peacock
Utah County	Preston Thomas
Tooele County	Alfred Lee
Weber County	Isaac Clark

Section 35 of "An ACT in Relation to the Judiciary," passed February 4, 1852, further established the county court which was to be composed of the probate judge and the selectmen who were to be elected in each county.[42] This court was to perform the duties of a county commission with jurisdiction over: "the conservation and disposition of timber and water resources; the districting for road, school, voting , and other purposes; the levying of taxes; the construction of public buildings; the care of stray animals; and the election or appointment of lesser officials."[43] In addition to the

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[40]Powell, "Fairness," 257; Gee, "Justice," 130n; also Earl S. Pomeroy, *The Territories and the United States, 1861-1890* (Philadelphia: University of Pennsylvania Press, 1947): 59-60.

[41]*Laws of Utah,* 1852: 174-75.

[42]Ibid.: 45, 52-53.

[43]Eugene E. Campbell, "Governmental Beginnings," in Richard D. Poll, et al., eds, *Utah's History* (Provo, Utah: Brigham Young University Press, 1978): 163-64.

above powers, the county court was to have the power, in connection with the probate court: "to oversee the poor. . . provide for their maintenance, to take the care, custody, and management of insane persons . . . who are incapable of conducting their own affairs," and the authority to "bind out orphan children, and vicious, idle, or vagrant children until they shall attain the age of legal majority." In short, the county court was designed to provide the same services to the community, toward those unable to provide for themselves, as was the intent with the probate court.[44]

By act of the Legislative Assembly, approved January 13, 1854, the judicial districts were altered as follows:

> That the first Judicial District shall embrace and be composed of Great Salt Lake, Davis Weber, Tooele, and Utah counties, and all regions of country lying east, north and west of said counties; and the second of Juab, San Pete, and Millard counties, and all regions of country lying south of the south latitude of Utah county, and north of the south latitude of Millard county; and the third of Iron county, and all regions of country lying south of the south latitude of Millard county.[45]

The act further elaborated on the judicial system by changing the justices for the first and second districts to the Honorable Leonidas Shaver and the Honorable Lazarus H. Reed, respectively. Reed was appointed chief justice and Shaver was appointed as the second associate justice. Zerubbabel Snow was sustained as associate justice for the third district. Times and locations for the District Courts were established as follows: first district, the first

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[44] *Laws of Utah,* 1852: 52-53.

[45] *Laws of Utah,* 1854: 12-13.

Monday in December in Great Salt Lake City, the first Monday in March in Ogden City, the third Monday in March in Provo City, and the second Monday in August in Fort Supply; second district, the third Monday in October in Nephi City, the last Monday of October in Manti City, and the second Monday of November in Fillmore City; third district, annually on the third Monday in November in Parowan City. The Supreme Court was directed to sit in session on the first Monday of January in Great Salt Lake City.[46]

The following year (1855), the territorial legislature again addressed the judicial system by affirming the district courts' right of supervision of all inferior courts in an attempt to "prevent and correct abuses where no other remedy is provided" thus establishing a hierarchy by which an avenue of appeal was established in the territory. However, the assembly once again confirmed the duplicity in jurisdiction between the district and probate courts in terms of original jurisdiction in both civil and criminal cases.[47]

As the Territory of Utah was further divided into new counties, and the territorial capital was moved to Fillmore, in a related act, the districts were reapportioned as follows: "That the first judicial district shall embrace and be composed of Great Salt Lake, Davis, Weber, Desert, Tooele, Summit, Green River, and Utah counties; -- and the second of Juab, San Pete, Millard, Iron, and Washington counties; and the third of Carson county." The supreme court was also now to be held annually on the first Monday in

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[46] *Laws of Utah,* 1854: 12-13.

[47] *Laws of Utah,* 1851-1870: 29.

January in Fillmore City as opposed to Great Salt Lake City.[48]

The fifth session of the Legislative Assembly passed a resolution on January 17, 1856 repealing the act entitled: "An Act Relating to the United States Courts for the Territory of Utah, Approved January 19, 1855," and established the judicial districts as: first -- Davis, Weber, Box Elder, Cache, Summit, Green River, Malad, Greasewood and Desert counties;
second -- Utah, Cedar, Juab, San Pete, Millard, Beaver, Iron and Washington counties; and third -- Great Salt Lake, Tooele, Shambip, Saint Mary's, Humbolt and Carson counties.[49] (Figure 1)

On the same day, the legislature passed additional resolutions assigning the Honorable John F. Kinney to the post of chief justice, to hold court in the first judicial district in the county seats of Davis, Weber, Box Elder and Green River counties on the first, second and third Mondays in March, and the first Monday in May respectively. The Honorable W. W. Drummond was appointed associate justice in the second district to hold court in the county seats of Utah, San Pete, Millard and Iron county on the second and fourth Mondays in April, the second Monday in May, and the first Monday in June respectively. And finally, the Honorable George P. Stiles was appointed associate justice for the third district, to hold court in the county seats of Carson, Tooele and Great Salt Lake counties on the first Monday in July, October and November respectively. This action also meant the repeal of the resolution entitled "Resolution

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[48] *Laws of Utah*, 1855: 258.

[49] *Laws of Utah*, 1856: 12-13.

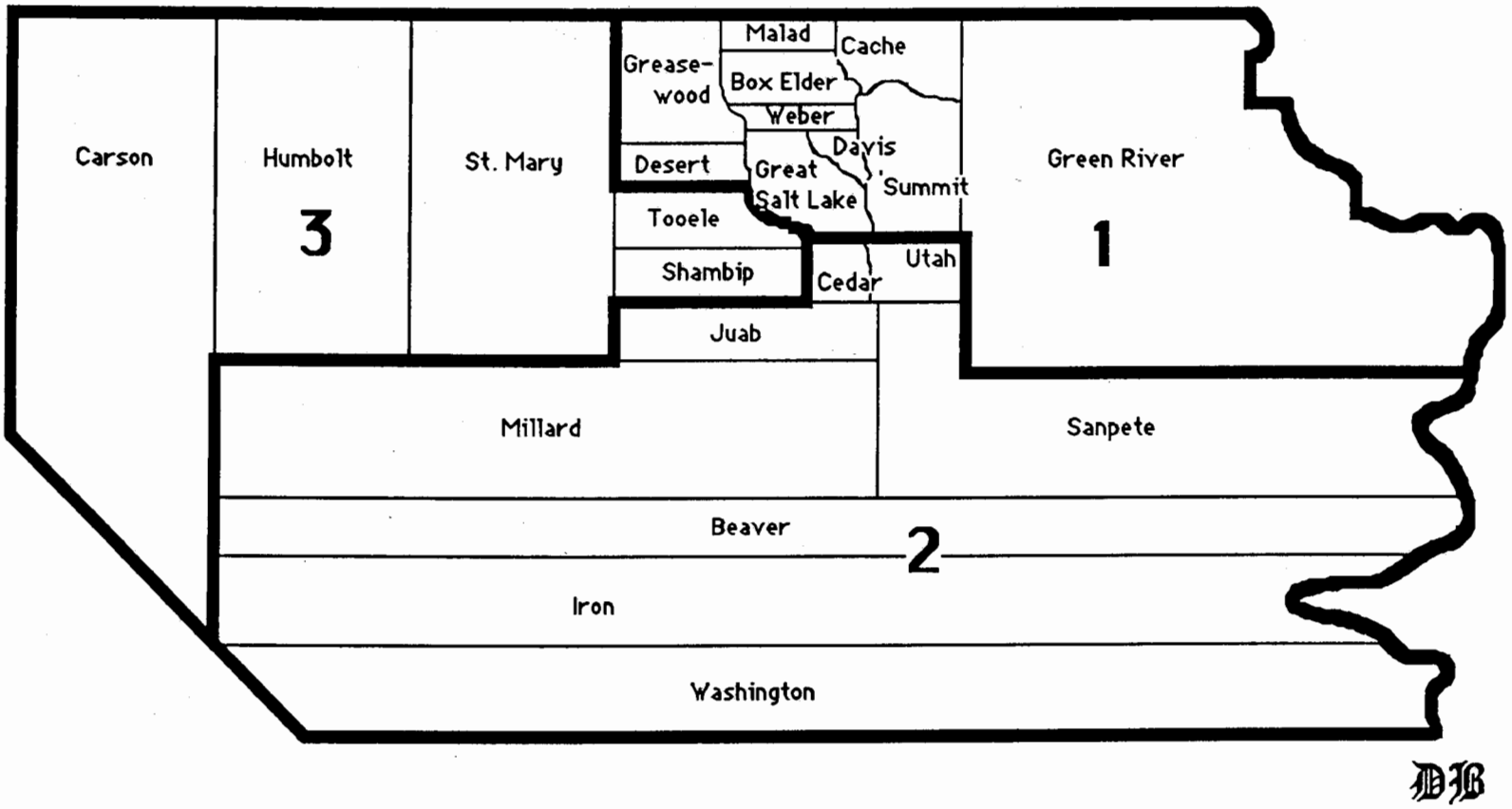

Figure 1

January 17, 1856

Specifying the Times of Holding the United States Courts in the Several Judicial Districts, Approved January 19, 1856."[50]

In an act approved January 21, 1859, the districts were again changed to the following: first -- Washington, Iron, Beaver, Millard, San Pete, Juab, Utah and Cedar counties; second -- Carson, Humbolt, and St. Mary counties; and third -- Shambip, Tooele, Great Salt Lake, Summit, Green River, Davis, Weber Box Elder, Cache, Malad, Greasewood and Desert counties. In January of 1862, the Legislative Assembly once again altered the district apportionments as follows: first district -- Millard, San Pete, Juab, Utah and Wasatch counties; second district -- Washington, Iron and Beaver counties; and third district -- Great Salt Lake, Tooele, Summit, Green River, Davis, Weber, Box Elder, Morgan and Cache counties.[51] (Figure 2)

In the December 1865 legislative session the judicial districts were once again altered. The first district was now composed of Millard, Piute, Sevier, San Pete, Juab, Utah and Wasatch counties. Kane, Washington, Iron and beaver counties were now in the second district. The remaining counties of Great Salt Lake, Tooele, Summit, Green River, Davis, Morgan Weber, Box Elder, Cache and Richland would comprise the third district.[52] (Figure 3)

The terms during which the supreme and district courts were to sit were also altered. The supreme court was now to be held on

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[50]Ibid.

[51]*Laws of Utah,* 1858-1859, Chapter 5: 9.

[52]*Acts, Resolutions and Memorials Passed at the Several Annual Sessions of the Legislative Assembly of the Territory of Utah* (Salt Lake City: Henry McEwan, Public Printer, 1866): 194.

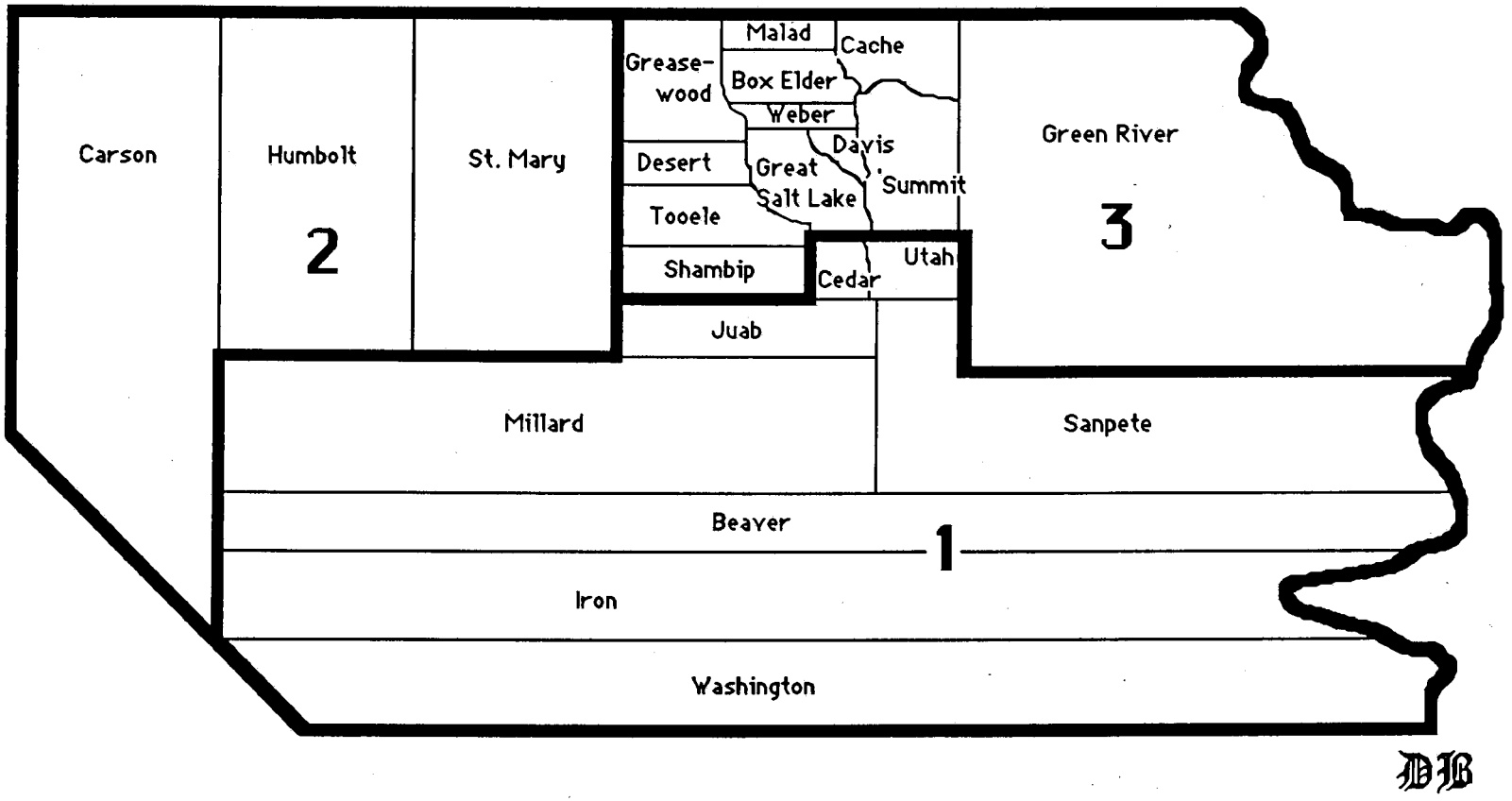
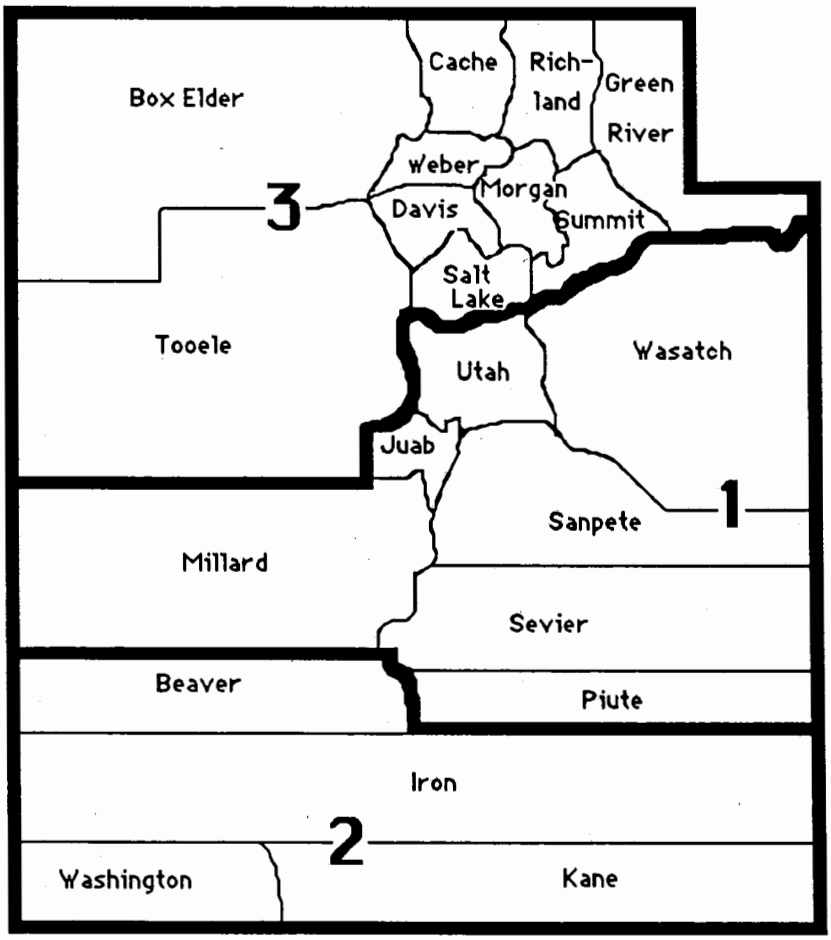


Figure 2

January 21, 1859



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December 27, 1865

Figure 3

the second Monday in November in Great Salt Lake City. The first district court was to convene in Manti, San Pete County on the third Monday in October with Associate Justice Thomas J. Drake presiding. The second district was to sit in St. George, Washington County on the first Monday in February with Associate Justice Soloman P. McCurdy at the bench. Court was to be held in the third district in Great Salt Lake City commencing on the second Monday in March, Chief Justice John Titus presiding. In an attempt to prevent confusion, the act further declared that "all matters and proceedings now pending in the District Courts of the First and Second Judicial Districts shall by deemed pending in the said Courts at the times and places herein specified."[53]

As the population in southern Utah continued to grow, it facilitated organization of Rio Virgen County. This county was attached to the second judicial district. However, this condition was soon to change when on February 16, 1872 the legislature extended the boundaries of Washington County to the western line of the territory to encompass the area previously defined as Rio Virgen County.[54] (Figure 4)

Piute County is the focus of controversy in terms of when it was removed from the first judicial district and incorporated into the second. According to the *Compiled Laws of Utah* for 1876, the county was part of the second district on December 27, 18655. However, February 12, 1874, is given as the date of transference as

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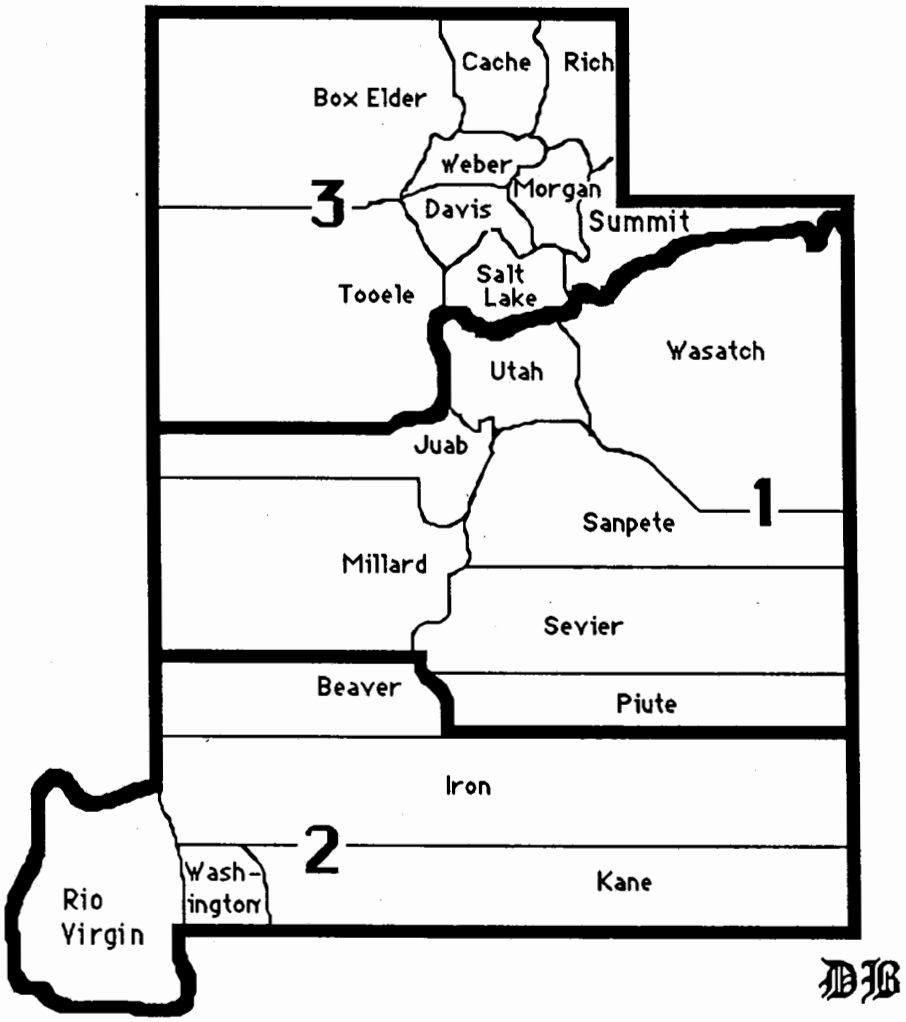
[53]Ibid.

[54]*Laws of Utah,* 1869: 7; and *Laws of Utah,* 1872: 28.



February 18, 1869

Figure 4

recorded by the *Acts and Resolutions* of the twenty-first session of the Territorial Assembly.[55]

Due to the increasing conflict between Mormons and non-Mormons in the 1870s over the question of jurisdiction and possible abuse of the probate courts, the federal government stepped in to clarify some of the inconsistencies within the Utah judicial system. As an example of the extreme latitude practiced by the probate courts from 1861 to 1864, the Probate Court of Salt Lake County had ventured so far as to pronounce the death penalty in a number of cases, one of which was carried out.[56]

Beginning with the territorial supreme court decision in *Cast v. Cast* (October 1873) and followed by the federal Supreme Court decision in *Perris v. Higley* (November 1874) the power of the probate court was gradually pared away.[57] Perris v. Higley was argued on March 21, 1873 and the opinion issued on November 16, 1874. However, since the arguments involved similar grounds as did Cast v. Cast, it is within good judgement to infer that Perris v. Higley may have been used as a model in Cast v. Cast.

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[55]*Laws of Utah,* 1876: 352; and *Laws of Utah,* 1874: 3.

[56]One such case is that of Jason R. Luce in which the defendant was found guilty of murder in the first degree in December of 1863 and executed by firing squad on January 12, 1864 without the case being heard in the district court, which was not sitting at the time, yet would be a short time after the execution was carried out. See: Douglas S. Beckstead, "Justice or Injustice: The Execution of Jason R. Luce in Salt Lake City, January 12, 1864," presented at the Phi Alpha Theta (History Honor Society) Regional Conference, University of Utah, May 1987.

[57]Cast v. Cast, 1 *Utah* 112-128; and Perris v. Higley, 87 *U.S.* 375-84. Additional information regarding the evolution of the probate court system in Utah can be found in W. N. Davis, "Western Justice: The Court at Fort Bridger, Utah Territory," *Utah Historical Quarterly* XXIII (1955): 99-125. It must be noted that Davis incorrectly cites the *Perris v. Higley* case as "*Ferris v. Higley:* " 107.

The single question in Perris v. Higley was whether the Salt Lake County Probate Court had jurisdiction to hear a case resulting in a decision in favor of George Cronyn and Company (a partnership between George Cronyn and Fred T. Perris) for a $1500.00 promissory note from W. G. Higley and Company.[58] Higley appealed the case to the third district court which reversed the probate court ruling on the grounds that the lower court did not have jurisdiction to hear such a case.[59] Upon the death of Cronyn, the surviving partner, Perris, appealed the case to the territorial supreme court where the district court opinion was upheld. The decision was appealed to the federal Supreme Court which also affirmed the district court ruling.[60]

The question was decided by the spirit rather than the letter, of the law involving establishment of the probate court under the Organic Act. The ninth section of the Act establishes a judicial system whereby the supreme and district courts would hold original jurisdiction in chancery and common law. The Act further elaborates on limitations of the justices of the peace, but does not mention the probate court other than to say it is restricted "as limited by law." In its interpretation of this section, and the

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[58]For the records of the case see: "Salt Lake County Probate Court Case Files, 1852-1869," (Utah State Archives, Series Numbers 03765 and 00373).

[59]For the minutes of the case before the third district, see: "Minutes of the Third District Court, Book A:" 484, 487, 489, 491, (Utah State Archives, Series Number 01652). Note that the case is listed as: "W. G. Higley et al v. Cronyn & Co."

[60]Information regarding the action in the Territorial Supreme Court may be found in "Decisions Record Book, " (Utah State Archives, Series Number 01459). Also, one might examine the files of the supreme court for the records of the case itself.

subsequently challenged legislation entitled "An Act in Relation to the Judiciary, approved February 4, 1852," which granted the probate court jurisdiction equal to that of the district courts, the federal court found that only a portion of the judicial power of the territory was being vested in the probate court by the Organic Act. This interpretation conflicts with the equal jurisdiction granted by the Utah Legislative Assembly.

The answer to how much power was meant was sought in the general nature and jurisdiction of probate courts as they were known to exist in both the history of English common law and in practice within the United States.[61] Thus taking into account the spirit of the law rather than the exact letter of the law as being based in the maxim: *Quia ratio legis est anima legis.* "The letter of the law is the body of the law, and the sense and reason of the law is the soul of the law."[62]

The opinion of the court reflected the attitude of many non-Mormons as to the rationale behind granting the probate court jurisdiction equal to that of the federal district court:

> We are of the opinion that the [Act] which we have been considering is inconsistent with the general scope and spirit of the [Organic Act in] defining the courts of

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[61]87 *U.S.* 384.

[62]Lawrence M. Friedman, in *A History of American Law* (1985), describes in great detail the power and process of probate court jurisdiction dating from early English common law, colonial interpretation and practice, through twentieth-century reform. See: Lawrence M. Friedman, *A History of American Law* (New York: Simon &Schuster, Inc., 1985): 55, 65, 141-42, 248-49, 677.

> the Territory, and in the distribution of judicial power amongst them, inconsistent with the nature and purpose of a probate court as authorized by that Act, and inconsistent with the clause which confers upon the Supreme Court and district courts general jurisdiction in chancery as well as at common law. The fact that the judges of these latter courts are appointed by the federal power, paid by that power -- that other officers of these courts are appointed and paid in like manner -- strongly repels the idea that congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the Territorial Legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the Territory.
>
> The Act of the Territorial Legislature conferring general jurisdiction in chancery and at law on the probate courts is, therefore, void.[63]

The Cast v. Cast suit arose from a divorce action instituted in the third district court in which a decree of divorce was granted to the plaintiff along with an order for alimony. Thereupon, the defendant, Eric M. Cast appealed to the territorial supreme court upon the question as to the jurisdiction of the district court to hear and determine cases of divorce. Argument was based upon the assumption that divorce is "neither the subject of common law nor equity jurisdiction" but is considered a "special proceeding" which is "purely statutory" in nature. In Utah Territory the statutory nature of divorce is contained in an act entitled "An Act in relation to Bills of Divorce," approved March 6, 1852 wherein divorce is committed to the probate court with no mention of jurisdiction being granted to the district courts. Therefore, the right of hearing a divorce case in

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[63]Ibid.: 385.

the district court was against the laws of the Territory.[64]

The opinion, delivered by Mr. Justice Jacob S. Boreman, was rather far reaching and cleared some of the ambiguities in the law. The findings of the court include:

> 1) Jurisdiction in Divorce Cases -- The jurisdiction of the District Courts does not depend on Territorial Statutes, but if such were the fact, the Legislature of the Territory has conferred jurisdiction on these courts by "An Act regulating the mode of procedure in civil cases in the Courts of the Territory of Utah," approved Dec. 30, 1852, and "An Act in relation to the Judiciary," approved Jan 19, 1855.
>
> 2) Chancery Jurisdiction of the Probate Courts. -- The District Courts have Jurisdiction in all suits for divorce, by virtue of their Common Law, and Chancery powers conferred by the Organic Act.
>
> 3)ID. -- The statute in relation to divorces having given the right to a dissolution of the marriage contract, for the various causes mentioned, but failed to provide a competent tribunal to hear and determine suits of that character, the jurisdiction in such cases necessarily attaches to the District Courts of the Territory, as Superior Courts of General Jurisdiction.
>
> 4) Act Conferring Jurisdiction Upon Probate Court, Void. -- The Territorial Legislature has no power, under the Organic Act, to confer jurisdiction on applications for divorce upon the Probate Courts; it therefore follows that the sections of "An Act in relation to Bills of Divorce," approved March 6, 1852, which purport to confer such jurisdiction, are void.
>
> 5)Probate Courts Inferior Tribunals. -- The Probate Courts are inferior tribunals, and their jurisdiction cannot be inferred, it must be given by positive law.[65]

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[64]Cast v. Cast, 1 *Utah* 113-14.

[65]Ibid.: 112.

On June 23, 1874 Vermont Representative Luke P. Poland introduced a bill entitled "An Act in Relation to Courts and Judicial Officers in the Territory of Utah." The Poland Act, as it came to be called, restored the judicial system to the original Organic Act pattern by defining the district courts as having exclusive original jurisdiction in all suits involving amounts over three hundred dollars, mines and mining claims regardless of value, and in divorce. Jurisdiction for suits involving amounts of less than three hundred dollars were placed with the justices of the peace. The act continued to affirm the Organic Act in that the district courts were to retain original jurisdiction in all cases, both civil and criminal.

The Poland Act defined the jurisdiction of the probate courts as solely settlement of the estates of decedents, guardianship "and other like matters." The probate court was stripped of all power regarding civil and criminal concerns with the exception of "suits for divorce for statutory causes" which jurisdiction was held concurrently with the district court. The defendant in a suit for divorce that had been commenced in the probate court was also entitled to have the suit removed to the district court provided that such a transfer took place after appearance, but before entering a plea or answer.[66]

This act also elaborated on the appeal process for cases from both justices of the peace and the probate courts to the district courts within which district the lower courts presided. The appeal was to include the trying of a case "de novo," without taking the

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[66] *Laws of Utah,* 1876: 53-54.

lower court's decision into account. Such appeals could be taken from the lower court to the respective district court in cases where judgement had previously been made but remained unexecuted. The Supreme Court of the United States was to exercise the final decision in appeals from the territorial courts through the issuance of a writ of error to the territorial supreme court in criminal cases where the accused was sentenced to capital punishment or conviction of bigamy or polygamy. To avoid any conflict with existing statutes of the Territory, the act selectively confirmed and approved various parts of earlier laws and as a result disapproved others, thus eliminating the need to completely rewrite all of the previous legislation.[67]

When the caseload of the district justice became too overbearing, the 1874 act allowed the judge to request the assistance of a justice from either of the other districts. When such assistance was requested, the assisting judge was considered to have the same power as if he were duly assigned to convene court in that district. There exist during the territorial period a number of instances in the Third District Court where such assistance was requested to handle a large case load.[68]

As the district court held the power to grant citizenship to alien residents, it will be helpful to outline the process of naturalization put forth by Congress. Upon proof of residence in the United States for at least five years and at least one year in the

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[67]Ibid., Secs. 3, 5, 7.

[68]Ibid.: 54.

state or territory in which they applied for citizenship, an alien resident could petition the circuit or district court for citizenship. The process includes: the filing of affidavits by two witnesses testifying to the character of the applicant, renunciation of allegiance to any "foreign prince, potentate, state or sovereignty" and in the case of aliens who hold an hereditary title, "or have been of any of the orders of nobility in the kingdom or state from which he came ... shall in addition to the above requisites, make an express renunciation of his title or order of nobility ..." Upon satisfactory compliance with the above, an oath is administered to the applicant, swearing allegiance to the Constitution of the United States.[69]

Although only the district court existed in Utah during the territorial period, it is of interest to note that by virtue of the ambiguities of Utah Territorial law the probate court also granted citizenship to aliens. Such action was justified by the Mormons because, as historian B. H. Roberts claims: "Under the practice of the federal courts of Utah, in this period, in the matter of naturalizing aliens, 'no Mormons need apply,' might as well have been posted over the court entrance, unless he was willing to deny his religious faith."[70]

This attitude must be balanced with the reasoning behind the denial of polygamist petitions for citizenship. The matter evolves from a case on heard on October 6, 1870, when a Mormon, William

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[69]*Laws of Utah,* 1888: 125-30.

[70]B. H. Roberts, *A Comprehensive History of the Church of Jesus Christ of Latter-day Saints* (6 vols., Salt Lake City, 1930), V: 388.

Horsley, applied to Judge James B. McKean's court for naturalization. Upon examining him concerning his belief in plural marriage and asking if he felt the Anti-bigamy act of 1862 was binding upon him, the petitioner answered that he believed he should follow "the laws of God rather than the laws of man." The petition was denied on the grounds that he was not of good moral character. This action was seen, by the Mormons, as an infringement on their religious liberty. As a result, attitudes such as Roberts' and many others were laid.[71]

McKean, in an article in the *Salt Lake Tribune* , defended his actions as:

> In this country a man may adopt any religion that he pleases, or reject all religion if he pleases. But no man must violate our laws and plead religion as an excuse; and no alien should be made a citizen who will not promise to obey the laws. Let natives and aliens distinctly understand that in this country, license is not liberty, and crime is not religion.[72]

Although charges of impartiality and unfairness have been leveled at the federal justices, it is important to realize that they were upholding the law, as is evident in this instance.[73]

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[71]In Thomas G. Alexander, "Federal Authority Versus Polygamic Theocracy: James B. McKean and the Mormons, 1870-1875," *Dialogue: A Journal of Mormon Thought,* I (Autumn 1966): 88, the author credits the denial to the petitions of two Mormons. However, in consulting the minutes of the court one finds only the petition of William Horsley was heard and denied on the date in question. See "Minutes of the Third District Court, Book BB:" 91, (Utah State Archives Series Number 001652).

[72]Cited as *Salt Lake Tribune*, October 15, 1870 in Thomas G. Alexander, "Federal Authority Versus Polygamic Theocracy: James B. McKean and the Mormons, 1870-1875," *Dialogue: A Journal of Mormon Thought,* I (Autumn 1966): 88.

[73]For a discussion of these points see: Thomas G. Alexander, "Federal Authority Versus Polygamic Theocracy: James B. McKean and the Mormons, 1870-1875," *Dialogue: A Journal of Mormon Thought,* I (Autumn 1966): 85-100; and Leonard J. Arrington, "Crusade Against Theocracy: The Reminiscances of Judge Jacob Boreman of Utah, 1972-1877." *Huntington Library Quarterly* 24 (November 1960): 1-45.

1880 brought the formation of the counties of Emery (February 12), San Juan (February 17), and Uintah (February 18). The new counties were attached to the first, second and first judicial districts respectively. Then, on February 20, 1880 the territorial assembly passed an act redefining the judicial districts as: first -- Millard, Sanpete, Sevier, Juab, Wasatch, Utah, Emery, Uintah, Weber, Box Elder, Cache, Rich and Morgan counties; second -- Iron, Kane, Piute, San Juan and Washington counties; and third -- Salt Lake, Tooele, Summit and Davis counties.[74]

By legislative action on March 9, 1882, the boundaries of Iron, Washington and Kane counties were changed. The same act also allowed for the creation of Garfield County with Panguitch designated as the county seat. The new county was attached to the second judicial district.[75]

The conflict between the Mormons and the federal government continued through the 1880s. Several attempts were made, by both sides, to either affirm the practice of polygamy or ban it outright. With the *Reynolds Decision* in 1879 the Supreme Court upheld the constitutionality of the 1862 Antipolygamy Act stating that: "Laws are made for the government of actions and while they cannot interfere with mere religious belief and opinion they can with practices ..."[76]

The decision had a bearing on the judicial system in Utah in

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[74]*Laws of Utah,* 1880: 5, 10, 11, 67.

[75]*Laws of Utah,* 1882: 98-101.

[76]Gustive O. Larson, "Government, Politics and Conflict," in Richard D. Poll, et al., eds, *Utah's History* (Provo, Utah: Brigham Young University Press, 1978): 254.

that it paved the way for the introduction and passage of the Edmunds Act in 1882. This measure laid the groundwork for the successful prosecution of polygamy by defining "any may who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy." The law further elaborated on the subject by imposing, as a penalty, a fine of not more than five hundred dollars and imprisonment for not more than five years.[77]

The direct impact of the Edmunds Act upon the judicial system was in the jury selection process. The fifth section of the act states that any person who either practices or believes in the practice of polygamy shall be challenged and eliminated from sitting on a jury. However, there is one safeguard built into the act. Under the first condition, being a practitioner, the party may invoke his fifth amendment right against self-incrimination. The act further impacted the Mormon community by disenfranchising all polygamic practitioners.[78]

Vermont Senator George F. Edmunds, sponsor of the Edmunds Act, once again came to the forefront of the antipolygamy campaign by introducing in 1882 (the same year the Edmunds Act was passed) a second bill aimed at broadening the provisions of the 1862 Antibigamy Act. The bill was to accomplish this, first by expanding the powers of the federal judiciary and altering procedures in

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[77]*Laws of Utah,* 1888: 110.

[78]Ibid.: 111-12.

polygamy cases to facilitate their prosecution. Second, and more importantly to the Mormons, the bill was intended to disincorporate the church, take possession of church property and appoint government trustees to oversee its financial matters.

Considering that previous legislation against polygamy had received a rather luke warm response in Congress, often leading to its defeat, the Mormon hierarchy hoped for a quick demise to this attempt. It appeared that this would be the case when the bill was sent to the House Judiciary Committee for review and hearing. The chairman of the committee, J. Randolph Tucker, of Virginia and an opponent of the Edmunds Act of 1882, appeared to take the same stand on the new measure. He granted the Mormons an extended period of time for hearings and the opportunity to publicize their feelings that the bill was "harsh, unnecessary, and unconstitutional."[79]

Tucker had announced that he planned to eliminate several of the sections which he and the Mormons objected to. However, the report of the committee was not what was expected.

The new bill, now labeled the Edmunds-Tucker Act was passed by Congress and put into effect on March 3, 1887. The law disenfranchised the LDS Church, dissolved the Perpetual Emigration Fund Company and acted to prevent the territorial assembly from taking new measures to revitalize it. Also, the law redefined the crime of Polygamy, thus making prosecution easier and established

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[79]Henry J. Wolfinger, "A Reexamination of the Woodruff manifesto in Light of Utah Constitutional History," *Utah Historical Quarterly* (Fall 1971): 332.

new conditions for the judicial system in the territory.

Once again the probate court system came under fire. Almost reiterating the Poland Act of 1874, Edmunds-Tucker annulled all legislation by the territorial assembly granting probate judges powers other than "in respect of the estates of deceased persons, ...the guardianship of the persons and property of infants, and ...the persons and property of persons not of sound mind." The act stripped the power of the judges in all matters except as noted, with the exception of his being a member of the county court. The jurisdictions of all matters, again with the exception of those noted, were declared to be "had and exercised by the district courts of said Territory respectively." In order to completely sever any ties between the people of Utah and the control of the probate court, the act also made the position of probate judge an appointment of the President and required confirmation by the Senate.[80]

Legislative action on March 13, 1890 created Grand County in the southeast corner of the territory. The new county was officially attached to the first judicial district (Figure 5).[81]

The increasing caseload in the district courts prompted Congress to pass legislation entitled "An Act Providing for an Additional Associate Justice for the Supreme Court of the Territory of Utah and for Other Purposes" on June 25, 1888. However, the creation of a fourth judicial district was overlooked. To compensate for the oversight, the territorial assembly memorialized Congress

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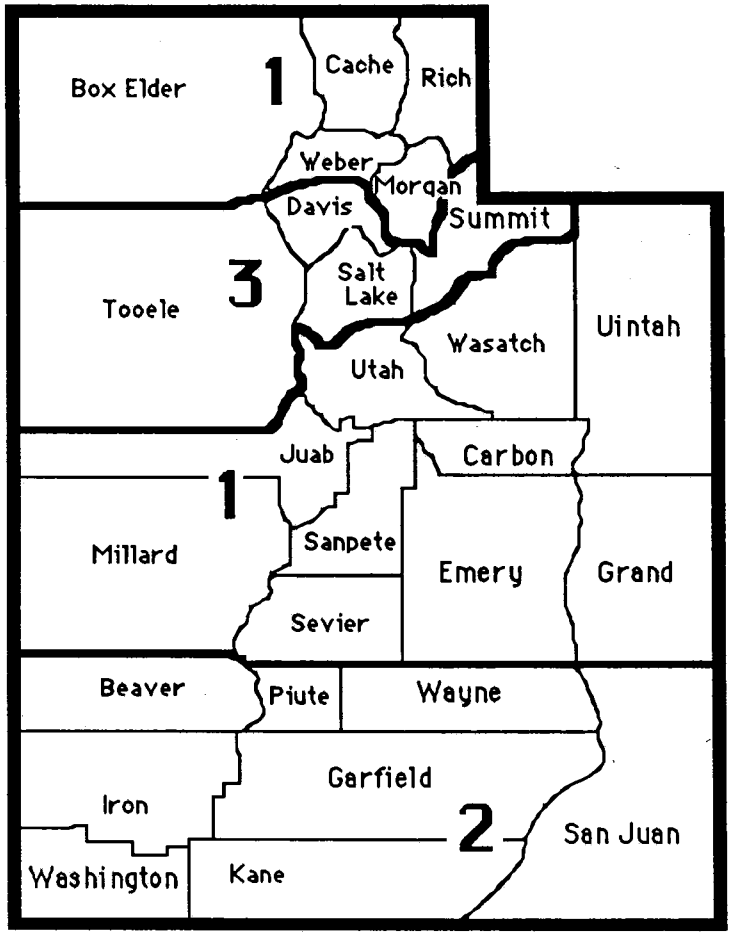
[80] *Laws of Utah,* 1888: 117, 121.

[81] *Laws of Utah,* 1890: 138.



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March 13, 1890

Figure 5

on January 27, 1890 (approved on January 29) for the creation of such a district, citing the fact that four justices now served three districts, thus creating a "great inconvenience [to] the judges aforesaid and [to] the people of said Territory."[82]

The memorial continued in stressing the subservience of Utah Territory to the laws of the federal government in that they point out "that the Governor and Legislative Assembly of said Territory are powerless to create a fourth judicial district or provide for the organization thereof." The Assembly further requested that Congress pass legislation "as will enable said Governor and Legislative Assembly to create and organize a fourth judicial district in said Territory, and alter, change and modify, from time to time, the organization of the several judicial districts in said Territory in such manner as said Governor and Legislative Assembly may deem wise and expedient."[83]

Congress allowed the Assembly to enact appropriate legislation to create a fourth judicial district. This action was undertaken in 1892 when the Assembly passed "An Act Creating and Defining New Judicial District." The new district was to include the counties of Weber, Box Elder, Cache, Rich, Morgan, "and all counties hereafter formed out of the territory embraced in said counties" were to by assigned to the fourth judicial district. The first district was now to include Millard, San Pete, Sevier, Juab, Wasatch, Utah, Emery, San Juan, Grand and Uintah counties. The second, Kane,

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[82] *Ibid.: 138.*

[83] Ibid.

Washington, Iron, Beaver, Garfield and Piute counties. Salt Lake, Summit, Davis and Tooele counties were to comprise the third district.[84]

The Woodruff Manifesto, issued in 1890 in response to the ongoing attacks against Mormons and the practice of polygamy, cleared the way for Utah's admission into the Union on an equal basis with the other states.[85] The Enabling Act, passed in 1894, allowed the people of Utah Territory to convene a convention to draft a constitution to be submitted to Congress for approval.[86] The act also created two new courts.

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[84]*Laws of Utah,* 1892: 60.

[85]Information regarding the Woodruff Manifesto is contained in: Henry J. Wolfinger, "A Reexamination of the Woodruff Manifesto in Light of Utah Constitutional History," *Utah Historical Quarterly* 39 (Fall 1971): 332.

[86]*Laws of Utah,* 1898: 31.

Utah State Courts

Admission of Utah to the Union on an equal judicial basis involved first, placing Utah into the eighth (federal) judicial circuit. Second, the establishment of a federal district court (separate from, but in conjunction with, the state focused district courts). The State of Utah was to compose the entire district which was to be called the District of Utah.[87] This district court, as differentiated from the state-level district courts, would hold jurisdiction strictly over federal cases -- those involving Constitutional issues, cases in which the United States government is a party and those involving diversity of parties across state lines. The district courts in the territory retained control over those cases involving territorial statutes.

The appeals process for the two courts is likewise differentiated by jurisdiction. Those cases originating in the territorial district courts could be appealed to the territorial supreme court and then to the federal Supreme Court.

Statehood brought about changes in the appeals process. Appeals for cases arising under state district courts are appealed to the state supreme court, whose decision is then final. The exception to this is when the federal court system has been specifically empowered to hold jurisdiction; ie, in questions of constitutionality.

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[87] *Laws of Utah,* 1898: 31.

Then, and only then, can the case be appealed directly to the Supreme Court. On the other hand, the process of appeal for cases originating in the federal district court is, first, to the Circuit Court of Appeals and second, to the Supreme Court.[88]

In significance of the transition from territory to state, the federal circuit and district court justices were deemed to "possess the same powers and jurisdiction and perform the same duties" as other circuit and district judges in the United States. Likewise, they were to be governed by the same laws and regulations as the United States courts.[89]

The constitution for the State of Utah was adopted on November 5, 1895 by a vote of 31,305 to 7,687. The President of the United States, Grover Cleveland, announced the acceptance of the constitution and admission of Utah to the union of states on January 4, 1896, thus bringing the long territorial period to a close.

Legal historian Lawrence M. Friedman calls Utah's constitution of 1895 "a summary of the constitutional art."[90] He points out that the framers were able to take elements of the old and balance them with interjections of new theory and ideas. The old retained the tripartite government with a bicameral legislative. The new includes a strong statement on religious liberty, requirement of the legislature to prohibit women and children from working in the

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[88]Interview with Geoffrey Butler, Clerk of the Supreme Court of Utah, December 8, 1987.

[89]*Laws of Utah,* 1898: 31.

[90]Lawrence M. Friedman, *A History of American Law* (New York: Simon &Schuster, Inc., 1985): 353.

mines, and measures to prevent "political and commercial control of employees" by their employer.[91]

An interesting innovation in conservatory thought is Article XVIII which calls for the legislature to enact laws "to prevent the destruction of and to preserve the Forests on the lands of the state..." It is also noted that the Mormon-Gentile conflict is ever present with the elimination of the probate court and provisions banning plural marriage.[92]

The judicial system as established by the constitution has its powers vested in the Senate sitting as a court of impeachment, a supreme court, district courts, justices of the peace and "such other courts inferior to the supreme court as may be established by law." Those cases pending before the territorial probate courts were to be transferred to the district courts and prosecuted in the same manner as though the constitution had not been adopted.[93]

Although the probate court died a quiet death at statehood, the position of probate judge did not. In order to oust James C. McNally from his position as Probate Judge of Salt Lake County, Attorney General Alexander C. Bishop brought suit against him. McNally responded by filing a demurrer with the supreme court.[94] In it, he

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[91] *Laws of Utah,* 1898: 65.

[92] Lawrence M. Friedman, *A History of American Law* (New York: Simon &Schuster, Inc., 1985): 353.

[93] Under Article XXIV, section 9 and Article VIII, sections 1 and 7, a probate judge appointed under the territorial government ceased to hold office as such after January 13, 1896. *Laws of Utah,* 1989: 69.

[94] "A demurrer is a formal response to a pleading, which admits the allegations to be true for the purposes of argument, but asserts that no cause of action or defense is stated by the allegations of the pleading. It imparts that the party demurring will stay,

claimed that under Article XXIV, section 9, of the state constitution, he was entitled to hold the position of Probate Judge from the time of his appointment, by President Grover Cleveland on February 13, 1895, until the expiration of his two year term. The decision of the court, while denying McNally's allegations, sheds some interesting light into the separation of territorial and state governments, the differentiation of judicial powers and the sources of both judicial and executive power.

The opinion, written by Chief Justice Charles S. Zane and concurred to by Associate Justices George W. Bartch and James A. Miner, specifies that the clause asserted to by McNally could not be taken out of context from the remainder of the section and had to be viewed in light of Sections 1 and 7 of Article VIII which show the clear intention of abolishing the probate court. The decision of the court was that as a result of the manifest intention to dispense with the probate court, McNally would be left without an office and thus without authority as spelled out under the new constitutional limitation.[95]

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and not proceed, until the court decides whether he is bound to do so. Demurrers are either general, where no particular cause is assigned and the insufficiency of the pleading is stated in general terms, or special, where some particular defects are pointed out. Demurrers may be to the whole or any part of a pleading. under modern rules of civil procedure, the demurrer has been replaced by a motion to dismiss for failure to state a claim." See: Wesley Gilmer, Jr., ed., *Gilmer's Revision: The Law Dictionary* (Cincinnati, OH: Anderson Publishing Co., 1986): 105-6.

[95]13 *Utah* 26. Article XXIV, section 9 of the constitution states: "When the State is admitted into the Union, and the District Courts in the respective districts are organized, the books, records, papers and proceedings of the probate court in each county, and all causes and matters of administration pending therein, upon the expiration of the term of office of the Probate Judge, on the second Monday in January, 1896, shall pass into the jurisdiction and possession of the District Court..." See: *Laws*

The decision of the court is based upon the source from which the power of the state government is derived versus that of territory and which shall reign supreme. Justice Zane described the derivation of power for the territorial government as arising from Congress who in turn derives its power from the people of the United States. The state, on the other hand, is separate and distinct. Its power originates from the people of the state. The state is then seen as the sovereign whereas the territory is not.[96]

The question of which laws, territorial or state, should take precedence was decided through Article XXIV, section 2 which provides that "all laws of the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature." This section illustrates the adoption of territorial law by the state.[97] And yet, allowing the legislature of the state to void any laws no longer relevant. This action is grounded upon the tenth amendment to the U. S. Constitution whereby those powers not specifically designated to the federal government are reserved to the states.

The question of the position of probate judge was decided on the grounds that the convention provided for the incumbency of officials for offices that were to be maintained by the state.

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of Utah, 1898: 69.

[96]Ibid.: 27.

[97]*Laws of Utah,* 1898: 67.

Article VIII, Section 1 holds no provision for the continuation of the probate court. Therefore, without a position, there can be no incumbent.[98]

The problem presented with the continuum from territorial statutes into state is evident in the number of supreme court decisions in which a large portion of statutes passed by the legislature of 1896 were found to be inconsistent with the new constitution.

Martin B. Hickman, in a quantitative study of judicial review in Utah, found that during the first fourteen years following statehood, fifty three statutes were contested in the supreme court. Of these, thirty (56%) were upheld, while twenty three (43%) were deemed unconstitutional. The figures then decline rapidly for each decade following 1909. The provisions most frequently used to attack statutes are: 1) Article XIII, governing the levying of taxes; 2) Article I, section 7, due process; 3) Article VI, section 6, bans the passage of special laws on enumerated subjects; 4) Article V, separation of powers; and 5) Article VI, section 23, requiring all bills to have a single subject which must be clearly expressed in the title.[99]

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[98]13 *Utah* 28.

[99]Martin B. Hickman, "Judicial Review of Legislation in Utah," *Utah Law Review* 4 (1954): 50-51. For comparative purposes, Hickman's figures are as follows:

Period	Upheld	Declared Unconstitutional	Total
1869-1899	11	11	22
1900-1909	19	12	31
1910-1919	28	7	35
1920-1929	24	7	31
1930-1939	30	7	37

At statehood, those courts previously established under the Organic Act ceased to exist with the exception of justices of the peace. The functions of the territorial supreme court were divided among the federal circuit and district courts while some were retained for the state supreme court.

A second major change was the creation of seven judicial districts to replace the earlier four.[100] Each district was to have at least one justice but no more than three (only the third district was allotted three justices by the constitution of 1896). Each would serve a term of four years, with the exception of those who took office under the new system. They were to serve until the first Monday in January 1901; until their successors were sworn into office.[101]

The districts were now to consist of (Figure 6):[102]

First District -- Cache, Box Elder and Rich Counties
Second District -- Weber, Morgan and Davis
Third District -- Summit, Salt Lake and Tooele
Fourth District -- Utah, Wasatch and Uintah
Fifth District -- Juab, Millard, Beaver, Iron and Washington
Sixth District -- Sevier, Piute, Wayne, Garfield and Kane
Seventh District -- Sanpete, Carbon, Emery, Grand and San Juan

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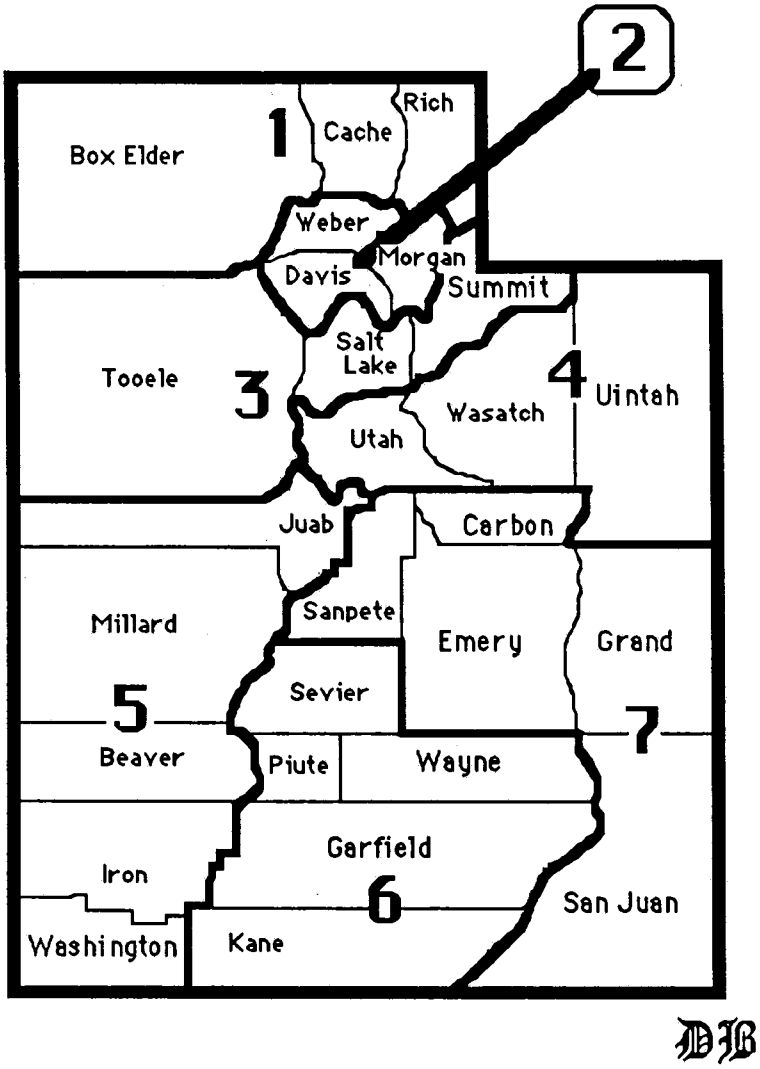
1940-1949	27	11	38
1950-1952	3	7	10

[100]Utah Constitution, Article 8, Section 16.

[101]Art. 8, Sec. 5

[102]Art. 8, Sec. 16.



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January 6, 1896

Figure 6

While the new districts were established at statehood, the legislature retained the power to reapportion the districts.[103]

The district courts were to hold original jurisdiction in "all matters civil and criminal, not excepted [by the constitution], and not prohibited by law." They were also given appellate and supervisory power over inferior courts, as well as the ability to issue the same writs as the supreme court.[104]

Possibly resulting from the "run-away" officials of the 1850s and 60s, Article VIII, section 27 provides for the removal of any judge who was absent from the state or his district for more than ninety consecutive days. However, the governor could extend a leave of absence if necessary to prevent a judge from forfeiting his position.[105]

Owing to the increasing consciousness of juvenile offenders and their treatment within the judicial system, the Utah State Legislature enacted on March 16, 1905, an act creating a juvenile court.[106] In cities designated as first and second class, the juvenile court comprised a separate and distinct court. In those where population size did not qualify for a separate court, a division of the district court was created to handle matters involving juveniles.[107]

The juvenile court held jurisdiction in all cases relating to

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[103]Art. 8, Sec.6.

[104]Art. 8, Sec. 7.

[105]Art. 8, Sec. 27.

[106]*Laws of Utah,* 1905: 182-83.

[107]Ibid.: 185.

children, under eighteen years of age, those deemed juvenile delinquents, and adults who are accused of contributing to the delinquency of a minor.

The judge of the juvenile court was to be appointed by a commission, known as the "juvenile court commission," composed of the mayor, chief of police and city superintendent of public schools. His term of office was to be four years.[108] By 1965, additional consciousness to the special needs of juvenile offenders prompted the Juvenile Court Bill to be amended to require that persons nominated to the position of juvenile judge have the qualities of "judicial temperament, and special aptitude for juvenile court work, taking into consideration his interes, understanding, and experience with respect to problems of family and child welfare, and with respect to the control of juvenile delinquency.[109]

Judgements of the juvenile court were taken on appeal directly to the supreme court. This shows the equal standing the court held with the district court. Notice of appeal however, was to be served on both the juvenile court judge and the county attorney.[110]

Considering that in the future it may be necessary to form new counties from those already existing, the legislature enacted a bill on March 7, 1913, to handle such a situation. The act, entitled "Manner of Creating a New County out of an Existing County," states that the governor has the power to proclaim what judicial district

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[108]The length of term was amended to be six years in 1957. See: *Laws of Utah,* 1957: 259.

[109]*Laws of Utah,* 1965: 599.

[110]*Laws of Utah,* 1907: 211.

the new county is to be in. Also, any legal actions pending in the territory encompassed by the new county were to be prosecuted in it, subject to change of venue.[111]

It was shortly more than one year when Duchesne County was created under the 1913 act. Secretary of State David Mattson, who was then Acting Governor, placed it in the Fourth Judicial District.[112] On November 16, 1917, Daggett County was created by proclamation. Once again, Secretary of State Hardin Bennion, acting as governor, placed the new county in the Second Judicial District (Figure 7).[113]

In 1917 the legislature enacted measures affecting the supreme court. The first, approved March 8, 1917, increased the number of court justices to five. The annual salaries for the jurists was set at $5000.00. This was increased to $7200.00 and the term of office was finalized at ten years in 1945.[114] Terms of office were extended to varying degrees between six and ten years. The second, approved the same day, decreed that copies of the decisions of the supreme court were to be furnished to the district court judges, district attorneys and to the counsel for the respective parties involved in the case. Finally, district justice's salaries

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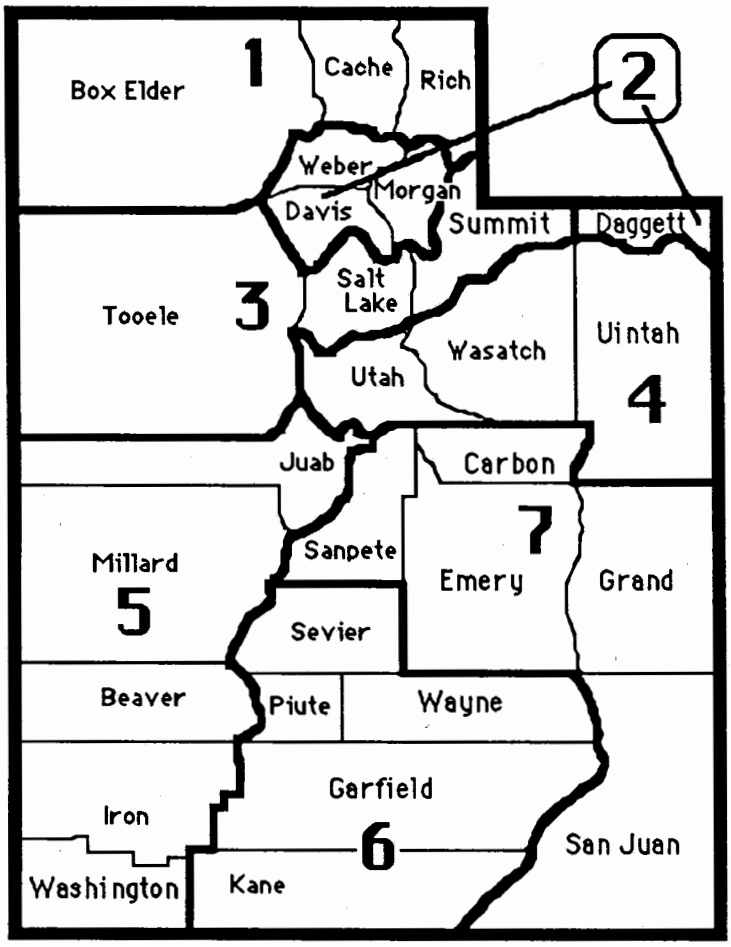
[111] *Laws of Utah,* 1913: 35-38.

A change of venue is granted to a defendant if it appears that he/she will not receive a fair trial due to prejudicial publicity beforehand.

[112] Executive Proceedings Record Books, Utah State Archives Series #00242, Box 8: 157-8.

[113] Executive Proceedings Record Books, Utah State Archives Series #00242, Box 9: 35-38.

[114] *Laws of Utah,* 1945: 86.



DB

November 16. 1917

Figure 7

were fixed at $4000.00 per year.[115]

1919 brought three changes to the district courts. First, Senate Bill 7, approved February 18, 1919, increased the number of justices in the third district from five to six. Second, Chapter 32, approved March 13, 1919, redefined the third judicial district to include Daggett County. Finally, an act passed amending Section 1673 of the *Compiled Laws of Utah*, 1917, which defined the terms for the district courts. The amended law allowed exception to the requirement of the court meeting three times each year for "sickness of the judge ... or the prevalence of a contagious disease in his said district where the legally established quarantine regulations pertaining thereto prohibit the holding of court ..." This action was brought due to the influenza epidemic that hit the region during 1917-18.[116]

The number of justices in the seventh district was increased to two in 1921. The additional justice was to be appointed by the governor, to serve until January 1923 when the new one could be elected and sworn into office. In the same year the issue of polygamy was once again raised. Repeal of Section 8094 of the *Compiled Laws of Utah, 1917* eliminated the exclusive jurisdiction of the district courts in polygamy cases.[117]

Also, the legislature added an additional justice to the fourth district raising the total allotted to two. Unlike the additional

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[115]*Laws of Utah,* 1917: 186, 187, 243.

[116]*Laws of Utah,* 1919: 54-56.

[117]*Laws of Utah,* 1921: 113, 392.

jurist for the seventh district, the new position was to remain vacant until the next general election in 1923, at which point the judgeship would be filled.[118]

As the judicial structure in Utah grew, so did appropriations for its operation. In 1925, the legislature granted $252,000.00 to the district courts for salaries and travel expenses. The supreme court was appropriated $74,300.00 for salaries, office equipment and expenses.[119]

Also in 1925 city and justices' courts were granted limited criminal jurisdiction in cities were the population was over 500. This jurisdiction was limited to: 1) petit larceny, 2) assault and battery, when not charged as a felony, 3) breeches of the peace, 3) committing a willful injury to property, and 4) all misdemeanors punishable by a fine of less than $300.00 and/or six months imprisonment.[120] This action differs from earlier legislation in that Section 9 of the Organic Act defined the powers of the justice of the peace to be "as limited by law: *Provided*, That justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars."[121] The first session of the territorial assembly limited the power of the justice of the peace to reflect the intentions of the Organic Act and included the

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[118] *Laws of Utah*, 1923: 145.

[119] *Laws of Utah*, 1925: 287.

[120] Ibid.: 125.

[121] *Laws of Utah*, 1851: 31-32. Emphasis is original.

jurisdiction to be for both civil and criminal matters where the punishment did not exceed a fine of one hundred dollars, or imprisonment of more than six months, or the punishment was to be both fine and punishment. This act also did not specify a limitation due to population.[122]

As the cost of living rose, the legislature appropriated a total of $85,710.00 to the supreme court for the period from March 1, 1927 through June 30, 1929 for salaries, office expenses and equipment. For the same period the district courts were allocated $283,500.00 for salaries and travel expenses.[123] The amounts allocated to the courts were decreased by $3410.00 and $28,500.00 respectively in 1929.[124] These figures were inflated once again in 1931 to appropriations of $84,100.00 to the supreme court and $256,000.00 for the district courts.[125] Even these amounts were found to be insufficient for the operation of the district courts as the legislature allotted an additional $10,000.00 for salaries and $5000.00 for travel from the general fund in the same year.[126]

The financial matters of the courts remained fairly constant in total amounts appropriated through the 1940s. In 1941, the supreme court was allotted $94,655.00 and the district court $237,600.00 for the period from July 1, 1941 through June 30, 1943. What the

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[122]Ibid.: 48-49.

[123]*Laws of Utah,* 1927: 158.

[124]*Laws of Utah,* 1929: 197.

[125]*Laws of Utah,* 1931: 267.

[126]Ibid.: 254.

district court lost from the previous allocations was gained by the supreme court.[127]

In an act approved March 11, 1949 the number of justices in each judicial district was increased to the following:

First district	1	Fifth district	1
Second district	2	Sixth district	1
Third district	6	Seventh district	2
Fourth district	2		

In addition to the above, the governor was allowed to appoint one additional justice in the second and fourth districts. These judges were to serve until June 30, 1951.[128]

Justices were added to the second and fourth districts bringing their totals to three each in 1951. These positions were filled by appointment of the governor until the next general election when permanent justices would be elected and sworn into office. In 1957 an additional justice was appointed to the third district, likewise in 1961 to the second, thus bringing the totals to seven and four respectively.[129] During the 1966 special session of the legislature, an additional justice was added to the third district bringing the total to eight.[130] Once again, the position was filled by governor's appointment to be effective until the 1966 general election.

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[127] *Laws of Utah*, 1941: 52.

[128] *Laws of Utah*, 1949: 55.

[129] *Laws of Utah*, 1951: 2; *Laws of Utah*, 1957: 409; *Laws of Utah*, 1961: 528.

[130] *Laws of Utah, First Special Session*, 1966: 20.

By the mid 1960s the judicial system in Utah had become strained under a heavy caseload. In an act approved March 21, 1967, several measures were taken to eliminate problems with the system. First, a judge, after retirement, and still able both mentally and physically to perform the duties of a judge, was permitted to sit in judgement on a case-by-case basis as a justice in the supreme, district or city courts. He was to be paid per diem, on an equal basis as those judges actively sitting on the bench.

Second, action was taken by the legislature to create the position of "Court Administrator," to be filled by the clerk of the supreme court. The court administrator would be responsible for the establishment of positions and salaries for the judicial system in accordance with law, among other duties to be expounded on later in this paper.

Next, a justice of the supreme court was to be designated as an "assignment justice." This position would entail, in conjunction with the court administrator; first, the issuance of orders requiring the establishment of record keeping practices and procedures; and second, to assign district judges to assist any courts which he found in need of assistance.

Under the direction and supervision of the supreme court, the administrator was to examine the administration and methods of the clerks of the district courts and to make recommendations for their improvement to the supreme court. He was to examine the state of the dockets and determine which of the district courts would need assistance to handle the load, then make recommendations to the assignment justice as to assigning additional personnel to aid those

courts in need of assistance. In the course of making recommendations for the improvement of the judicial system to the supreme court the administrator was to collect and compile statistics to be used in making reports of the business transacted in the courts, and to obtain reports on cases and other judicial business in which actions were delayed beyond the time specified by law or rules of court. These statistics were then to be reported to the supreme court.[131]

By this time, appropriations for the courts totaled more than one and a half million dollars. In the appropriations bill for the period form July 1, 1967 through June 30, 1969, the supreme court was allocated a total of $346,400.00 for salaries, expenses and the purchase of *Utah Reports* . For the same period, the district courts were allotted $1,350,800.00.[132]

In 1969, measures were taken to establish mandatory retirement for supreme court justices. The term of offices was set at ten years. Upon attainment of the legally mandated retirement age, the justice was to step down from the bench.[133]

Once again, due to population growth and an increasing court calendar, in an act approved on March 14, 1969, two additional justices were appointed to the third district bringing the total to ten. One justice was eliminated from the seventh district, which previously had tow. To eliminate a conflict over which justice

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[131] *Laws of Utah,* 1967: 585-586.

[132] *Laws of Utah,* 1967: 592.

[133] *Laws of Utah,* 1969: 997.

would resign, the act stipulated that the two sitting jurists would remain on the bench until the death, retirement or expiration of the term of either.[134]

Under the same act the judicial districts were established as:

First: Box Elder, Cache and Rich Counties
Second: Weber, Morgan and Davis Counties
Third: Salt Lake and Tooele Counties
Fourth: Utah, Wasatch, Duchesne, Uintah, Summit and Daggett Counties
Fifth: Juab, Millard, Beaver, Iron and Washington Counties
Sixth: San Pete, Kane, Piute, Sevier, Garfield and Wayne Counties
Seventh: Carbon, Emery, Grand and San Juan Counties[135]

In March of 1969, an act was passed giving all district justices the power to hold court in any county at the request of the judge of the district in which the county was situated. In cases where the governor or the court administrator requested a justice to convene court in another district or county, it was deemed to be his duty to do so.

Also in March, the position of assignment justice, which had previously been filled by election by the justices of the supreme court, was made an appointment of the governor.[136] The position of court administrator was also changed. The following powers were added to those already exercised under the 1967 act. First, the administrator was to establish uniform policies regarding sick leave, vacations and schedules for the district judges. Second, to

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[134]Ibid.: 997.

[135]Ibid.: 998.

[136]Ibid.: 999.

establish uniform hours for court sessions throughout the state, establish policies for calling retired justices to temporarily serve as district judges and to fix reasonable compensation for such service. Third, to schedule trials and court sessions and require or designate judges to preside at said trials and sessions. Fourth, to change the county for trial of any cases if no party to such actions files timely objections thereto.[137]

The position of assignment justice was altered in 1971 when it was to be a delegated position made by the district justices rather than being filled by a supreme court justice as was previously the case. For the additional responsibilities incurred, the justice would receive an additional $1000.00 per year. The assignment justice was empowered to: first, essay orders to require the establishment of record keeping practices and procedures in accordance with rules adopted by the supreme court. Second, assign district judges and court reporters to assist in any courts which he (the assignment justice) found to be in need of assistance based upon the reports given him by the court administrator.[138]

In 1973, the entire court administration system was revamped with the passage of the "Court Administration Act" on March 15. The purpose of the act was to create an administrative system for the district, city and justices' courts. This administrator would be subject to central direction by a judicial council, thereby enabling

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[137]Ibid.

[138]*Laws of Utah*, 1971: 612.

these courts to provide uniformity and coordination in the administration of justice.

The judicial council would consist of the following members: 1) a member from among the supreme court justices, elected by the justices themselves; 2) the chief justice of the district court, who would act as the chair of the council; 3) three members elected from and by the judges of the district courts; 4) one member elected from and by the judges of the city courts; 5) one member elected from and by the justices' courts; and 6) the president of the Utah Bar Association who would sit as an *ex officio* member of the council and would have no vote.

The council would be responsible for developing a uniform administrative policy for the courts throughout the state. The chief justice would be responsible for the implementation of these policies and for general management of the courts with the aid of the administrator. Additionally, the council was to publish and submit to the governor, the chief justice of the supreme court, and the legislature an annual report which was to include: financial and statistical data dealing with the operation of the courts, as well as including suggestions and recommendations for legislation.

The court administrator was to have the same powers as outlined in the acts entitled "Administration of District Courts"[139] and the "Administration fo District Courts -- Duties."[140] The final amendment to the previous court administrator legislation

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[139]*Laws of Utah,* 1967: 585-86.

[140]*Laws of Utah,* 1969: 1000-01.

established an annual judicial conference for all courts of the state. This was to facilitate the exchange of ideas among all courts and judges as well as to study viable means of improving the administration of justice and the courts.[141]

In 1975 Summit County was removed from the fourth judicial district and placed in the third thus making the district composition as follows:

First: Box Elder, Cache and Rich Counties
Second: Weber, Morgan and Davis Counties
Third: Salt Lake, Summit and Tooele Counties
Fourth: Utah, Wasatch, Duchesne, Uintah, and Daggett Counties
Fifth: Juab, Millard, Beaver, Iron and Washington Counties
Sixth: San Pete, Kane, Piute, Sevier, Garfield and Wayne Counties
Seventh: Carbon, Emery, Grand and San Juan Counties[142]

Additional justices were added to the second, third and fourth districts in 1976 bringing the totals to:

First district	1	Fifth district	1
Second district	5	Sixth district	1
Third district	11	Seventh district	1
Fourth district	4		

The seventh district continued to have two justices serving, even though it was officially allocated only one position.[143]

On March 9, 1977, the circuit court was established by the state legislature. The purpose of the act was to provide a court of limited jurisdiction, replacing the city courts. The new system is

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[141] *Laws of Utah,* 1973: 699-703.

[142] *Laws of Utah,* 1975: 123.

[143] *Laws of Utah,* 1976: 22; see also *Laws of Utah,* 1969: 997.

organized on a pattern similar to the present district courts.[144] (For an enumeration of the circuit courts, see Appendix B.)

In replacing the city court, the appeal process was simplified to a direct path to the district court. Appeals are to be heard "on the record," and trial *de novo* is eliminated. In other words, an appeal to the district court from the circuit court is not retried as though the initial trial had not taken place.

The circuit court holds expanded jurisdiction beyond that of the city court it replaced. Now, all misdemeanors and civil matters with damages of less than $5000.00 may be tried in the circuit court. Unlike that of the city court, the circuit court can try cases arising under both state and local ordinances.

Although the new court superceded the city court, the former city judges were to remain on the bench as circuit judges. At the time of the act creating the circuit court, there were twenty-five city court judges sitting on the bench. To this were added and additional eight bringing the total to thirty-three. Upon the expiration of the judges' terms, the positions were filled in the same manner as for district court judges. Any vacancy arising during the unexpired portion of a term is to be filled by a nominating commission which will include local officials. The justices' court, at the option of the local community, could be eliminated and likewise replaced with a circuit court. However, justices' courts were not automatically abolished.

Juab County was removed from the fifth to the fourth district

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[144] *Laws of Utah,* 1977: 324-391.

delineating the districts as follows (Figure 8):

First: Box Elder, Cache and Rich Counties
Second: Weber, Morgan and Davis Counties
Third: Salt Lake, Summit and Tooele Counties
Fourth: Utah, Wasatch, Duchesne, Uintah, Juab, and Daggett Counties
Fifth: Millard, Beaver, Iron and Washington Counties
Sixth: San Pete, Kane, Piute, Sevier, Garfield and Wayne Counties
Seventh: Carbon, Emery, Grand and San Juan Counties[145]

For comparative purposes, in 1981 the salaries of justices were set at $47,000.00 per year for the chief justice of the supreme court, $46,500.00 for associate justices; and $43,500.00 for district and juvenile court judges. These figures were to take effect on July 1, 1981.[146]

The final actions on the part of the legislature to alter the judicial districts and numbers of justices presiding in those districts took place on February 16, 1982. Justices were added in the third and seventh districts and the boundaries fo the fourth, fifth and seventh districts were modified. Thus bringing the totalnumber of justices to:

First district	2	Fifth district	1
Second district	5	Sixth district	1
Third district	14	Seventh district	2
Fourth district	4		

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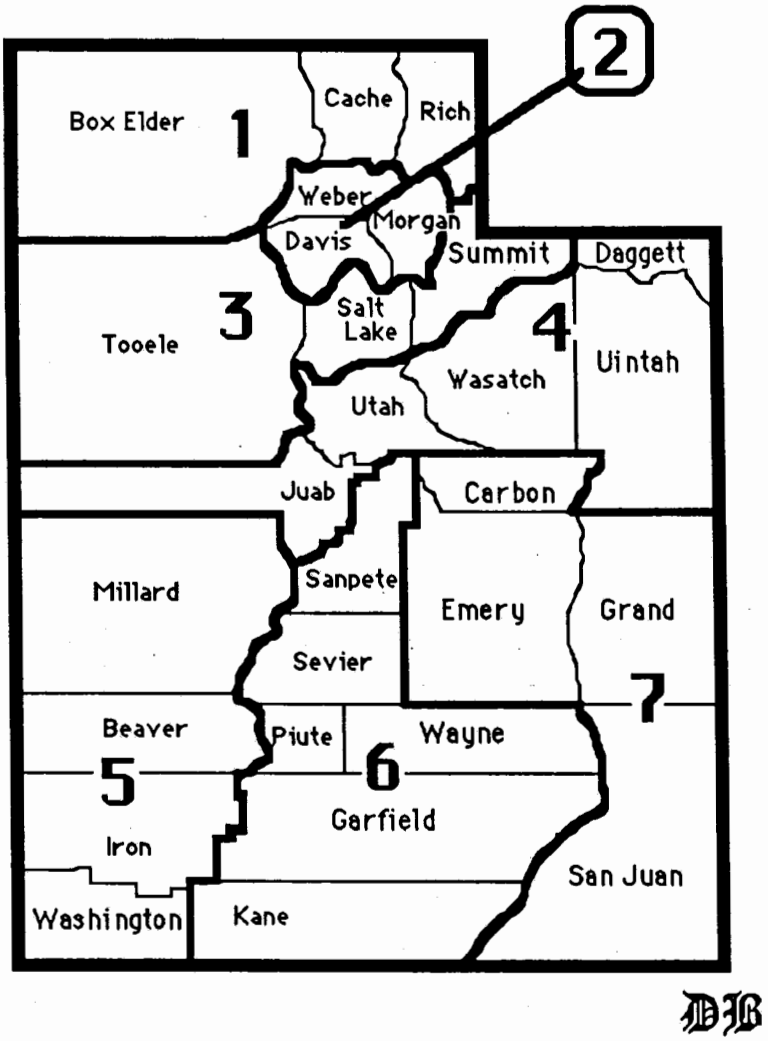
[145]Ibid.: 23.

[146]*Laws of Utah,* 1981: 932.



DB

April 22, 1977

Figure 8

And the judicial districts now include:

First: Box Elder, Cache and Rich Counties
Second: Weber, Morgan and Davis Counties
Third: Salt Lake, Summit and Tooele Counties
Fourth: Utah, Wasatch, Duchesne, Uintah, Juab, and Daggett Counties
Fifth: Millard, Beaver, Iron and Washington Counties
Sixth: San Pete, Kane, Piute, Sevier, Garfield and Wayne Counties
Seventh: Carbon, Emery, Grand and San Juan Counties[147]

As a result of over a century of change and consolidation of power, the Utah judicial system has evolved from an ecclesiastical system of bishop and high council courts to a secular system which is now composed of 1) the supreme court, 2) the court of appeals, 3) the district courts, 4) the circuit courts, 5) juvenile courts, and 6) justices' courts.[148] Of the present configuration, only the justices' courts have stood the test of time and remained in the judiciary from the Provisional State of Deseret through the twentieth century.

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[147] *Laws of Utah,* 1981-82: 117.

[148] *Laws of Utah,* 1986-87: IV, 229.

Appendix A: Periodic Listing of Courts

Period:	Court Designation:	Date Created:
State of Deseret:		
	Church Courts	circa 1847[1]
	Supreme Court	January 9, 1850[2]
	County Court	January 9, 1850
	Justices' Court	January 9, 1850
	Municipal Court	January 9, 1851
	Alderman's Court	January 9, 1851
	Probate Court	January 16, 1851
Territory of Utah:		
	Supreme Court	September 9, 1850
	District Courts	September 9, 1850
	Probate Court	September 9, 1850
	Justices' Courts	September 9, 1850
	County Court	February 4, 1852
Statehood:		
State Courts	Supreme Court	January 4, 1896
	District Courts	January 4, 1896
	Justices' Courts	January 4, 1896
	Municipal Court	March 14, 1901
	City Court	March 22, 1901
	Juvenile Court	March 16, 1905
	Small Claims Court	May 5, 1933
	Circuit Court	March 9, 1977
Federal Courts	Supreme Court	September 17, 1787
	Circuit Court[3]	July 7, 1894
	District Court	July 7, 1894

[1]Church courts fall under the Mormon Church hierarchy and were presided over by the local ward bishop. The church court is included here only because it sat in judgment over both civil and criminal matters. Appeal could be made to the High Council court and not into the secular judicial system. Records of these are located in the Historical Department of the Church of Jesus Christ of Latter-day Saints and are not available for research. Church courts continued to operate, hearing cases in some southern Utah towns until approximately 1910.

[2]The supreme court was provided for under Article IV of the *Constitution of Deseret*. The ordinance providing for the specific organization of the judiciary was not enacted until January 9, 1850. See: Morgan, "State of Deseret,": 169-174.

[3]Replaced by the Tenth Circuit Court of Appeals on February 20, 1929.

Appendix B: Table of Circuit Court Locations and Judges

Circuit	Counties	Primary Locations	Secondary Locations
1	Box Elder	Brigham City	
2	Cache	Logan	
	Rich		Randolph
3	Weber	Ogden	
		Roy	
	Morgan		Morgan
4	Davis	Clearfield	
		Layton	
		Bountiful	
5	Salt Lake	Salt Lake City	
		Murray	
		Sandy	
		West Valley City	
	Summit	Coalville	
6	Tooele	Tooele	
7	Duchesne	Vernal	
	Uintah		
	Daggett		Manila
8	Utah	Orem	
		Provo	
		Spanish Fork	
		American Fork	
	Juab		Nephi
	Wasatch		Heber
9	Millard		Fillmore
	Beaver		Beaver
	Iron	Cedar City	
	Washington	St. George	
10	Sanpete		Manti
	Sevier	Richfield	
	Piute		Junction
	Wayne		Loa
	Garfield		Panguitch
	Kane		Kanab
11	Carbon	Price	
	Emery		Castle Dale
12	Grand	Moab	
	San Juan		Monticello

Territorial Governors:

Nominee:	Residence:	Date of Nomination:	Date of Commission:	How succeeded:
Alfred Cumming	Missouri	12/19/57	7/11/57 1/18/58	Removed
John W. Dawson	Indiana	12/23/61	10/3/61	Rejected
Stephen S. Harding[1]	Indiana	3/24/62	3/31/62	Resigned
James Duane Doty[2]	Utah	1/6/64	6/2/63 2/2/64	Deceased 6/13/65
Charles Durkee	Wisconsin	12/19/65	7/17/65 12/21/65	To expire
J. Wilson Shaffer	Illinois	12/16/69	1/17/70	Deceased 10/31/70
Vernon H. Vaughn[3]	Alabama		11/1/70	
Silas A. Strickland[4]	Nebraska	1/12/71		Nomination withdrawn
George L. Woods[5]	Oregon	1/23/71	2/2/71	Expired
Samuel Beach Axtell[6]		12/15/74	2/2/75	Resigned
George W. Emery	Tennessee	12/9/75	7/1/75 12/13/75	Expired
Eli H. Murray	Kentucky	1/15/80	1/27/80 1/28/84	Resigned by request

[1]Chief Justice, Colorado, 1863-66.

[2]Justice, Michigan, 1823-32; Governor, Wisconsin, 1841-44; Delegate, Wisconsin, 1839-41; Superintendent Indian Affairs, Utah, 1861-63.

[3]Secretary, Utah, 1870.

[4]Did not serve.

[5]Justice, Idaho, 1866.

[6]Governor, New Mexico, 1875-78; Chief Justice, New Mexico, 1882-85.

Caleb Walton West[7]	Kentucky	4/5/86	4/21/86	Resigned by request
Arthur Lloyd Thomas[8]	Utah	12/5/89	5/6/89 12/30/89	Removed
Caleb Walton West[9]	Utah	4/7/93	4/14/93	Admission

[7]Governor, Utah, 1893-96.
[8]Secretary, Utah, 1879-87.
[9]Governor, Utah, 1886-89.

Territorial Secretaries:

Nominee:	Residence:	Date of Nomination:	Date of Commission:	How succeeded:
Francis H. Wootton	Maryland	4/9/60	4/19/60	Resigned
Frank Fuller	N. Hampshire	7/9/61	7/15/61	Removed
Amos Reed[10]	Utah	1/6/64	9/4/63	Resigned
			2/2/64	
Edwin Higgins	Michigan	12/17/67	12/20/67	Removed
S. A. Mann	Nevada	4/3/69	4/7/69	
Charles Campbell Crowe[11]	Alabama	5/24/70		Deceased
Vernon H. Vaughan[12]	Alabama	7/11/70	7/13/70	
George A. Black	Utah	1/16/71	2/2/71	Removed
			2/2/75	
Moses M. Blane	Illinois	5/18/76	6/8/76	Resigned
Levi P. Luckey	Illinois	4/7/79	5/1/79	Resigned
Arthur Lloyd Thomas[13]	Pennsylvania	4/7/79	5/1/79	Resigned
			5/1/83	
William C. Hall	Utah	1/4/88	3/26/87	Resigned by request
			1/16/88	
Elijah Sells	Utah	12/5/89	5/6/89	Removed
			12/30/89	
Charles C. Richards	Utah		5/6/93	Admission
			9/2/93	

[10]Indian Agent.
[11]Did not serve; Governor, New Mexico, 1869.
[12]Governor, Utah 1870-71.
[13]Governor, Utah, 1889-93.

Territorial Justices:

Nominee:	Residence:	Date of Nomination:	Date of Commission:	How succeeded:
Robert P. Flenniken	Pennsylvania	4/9/60	5/11/60	Removed (Waite)
John Fitch Kinney[14]	Nebraska	6/26/60	6/27/60	Removed
Henry R. Crosbie	Oregon	1/30/61	8/1/60	Removed (Drake)
			2/21/61	
Thomas J. Drake	Michigan	1/27/62	2/3/62	Resigned (Strickland)
			2/16/66	
Charles B. Waite	Illinois	1/27/62	2/3/62	Resigned (McCurdy)
John Titus[15]	Pennsylvania	1/5/64	5/6/63	Expired
			1/20/64	
Solomon P. McCurdy[16]	Missouri	4/13/64	4/21/64	Chief Justice (Hoge)
			1/23/68[17]	Rejected
Edwin O. Perrin[18]	New York	6/23/68		Rejected
Charles C. Wilson[19]	Illinois	7/25/68	7/25/68	
Enos D. Hoge		1/23/68		Unconfirmed, removed (Hawley)
Obed F. Strickland	Michigan	4/1/69	4/5/69	Resigned (Emerson)
Cyrus M. Hawley	Illinois	4/15/69	4/19/69	Expired (Boreman)
James Bedell McKean[20]	New York	5/24/70	6/17/70	

[14]Chief Justice, Utah, 1854-57; Delegate, Utah, 1863-65.
[15]Chief Justice; Jusitce, Arizona, 1869-70; Chief Justice, Arizona, 1870-74.
[16]Did not serve; nominated Chief Justice, Utah.
[17]Nominated Chief Justice, Utah.
[18]Did not serve.
[19]Chief Justice, Utah.
[20]Chief Justice.

			6/2/74	
Philip H. Emerson[21]	Michigan	3/7/73	3/10/73	Resigned (Powers)
Jacob S. Boreman[22]	Missouri	3/13/73	3/20/73	Resigned (Twiss)
			4/11/77	
			10/30/77	
Isaac C. Parker[23]	Missouri	3/16/75		Nomination withdrawn
David P. Lowe[24]	Kansas	3/18/75	3/19/75	
Alexander White[25]	Iowa		9/11/75	
John M. Coghlan[26]	California	3/29/76	3/28/76	Resigned
Michael Schaeffer[27]	Illinois	4/19/76	4/20/76	Removed
David T. Corbin[28]	So. Carolina	4/2/79		Rejected
John A. Hunter[29]	Missouri	7/1/79	7/1/79	Expired
Stephen P. Twiss	Missouri	12/7/80	12/3/80	Expired (Boreman)
			12/14/80	
Philip H. Emerson	Utah		5/16/ 81	Resigned
Charles Shuster Zane[30]	Illinois	7/2/84	7/5/84	Expired (Anderson)
Orlando W. Powers	Michigan	1/5/86	4/20/85	Nomination withdrawn
Henry P. Henderson	Michigan	7/20/86	8/2/86	To expire (Miner)
John W. Judd	Tennessee	7/9/88	7/19/88	Resigned (Blackburn)

[21]Jusitce, Utah, 1881-85.
[22]Justice, Utah, 1885-89.
[23]Did not serve, nominated Chief Justice.
[24]Chief Justice.
[25]Chief Justice.
[26]Chief Justice.
[27]Chief Justice.
[28]Did not serve; nominated Chief Justice.
[29]Chief Justice.
[30]Chief Justice, Utah, 1889-94.

Elliott Sandford[31]	New York	7/9/88	7/20/88	Removed
Thomas J. Anderson	Iowa	1/14/89	2/11/89	Resigned (Bartch)
John W. Blackburn	Utah	12/16/89	10/11/89	Removed (Smith)
			2/27/90	
Charles Shuster Zane[32]	Utah	12/5/89	1/7/90	Expired
James A. Miner	Michigan	6/20/90	8/2/90	Expired (King)
George W. Bartch	Utah	1/4/93	1/13/93	Statehood
Harvey W. Smith	Utah	8/16/93	5/8/93	Deceased (Rolapp)
			8/29/93	
Samuel A. Merrrit[33]	Utah	1/8/94	1/17/94	Statehood
William H. King	Utah	7/6/94	8/2/94	Statehood
Henry H. Rolapp	Utah	12/4/95	11/30/95	Statehood

[31]Chief Justice.
[32]Chief Justice, Utah, 1884-88.
[33]Chief Justice